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United States

Circuit Court of Appeals

For the Ninth Circuit.

A. EIKLAND and O. EIKLAND,

Plaintiffs in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and
ALLEN SHATTUCK,

Defendants in Error.


Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

JOHN H. COBB, Esq., Juneau, Alaska, Attorney
for Plaintiff in Error.

H. L. FAULKNER, Esq., Juneau, Alaska, Attor-
ney for Defendant in Error.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND and O. EIKLAND,
Plaintiffs,

vs.

W. W. CASEY, HENRY SHATTUCK and AL-
LEN SHATTUCK,
Defendants.

Amended Complaint.

Now come the plaintiffs by their attorney, and
leave of the Court first being had, amend their
original complaint herein, so that the same shall
hereafter read as follows:

The above-named plaintiffs, complaining of the
above-named defendants, for cause of action al-
lege:

I.

That in the year 1913, defendants were the owners

of a certain tract of land patented as the Farnum Placer Claim, and situated in the westerly part of the town of Juneau, Alaska, and covering the flats bordering a part of Gastineau Channel, at the mouth of a certain stream known as Gold Creek, and extending on both sides of said creek, which said tract they subdivided into lots and blocks, and placed upon the market as the Casey-Shattuck Addition to the town of Juneau.

II.

That in the said year, to wit, 1913, the plaintiffs purchased of the defendants a certain lot known and designated on the recorded plat of said Casey-Shattuck Addition, as Lot No. 6, in Block 209; and thereafter in said year plaintiffs erected thereon a substantial dwelling-house at a cost, and of the reasonable value of Three Thousand (\$3,000.00 Dollars. [1*]

III.

That the said Gold Creek flows from the mountain range east of Juneau, the greater part of its course being through a canyon, out of which it flows at or near the boundary of said Casey-Shattuck Addition, across which it flows into Gastineau Channel on the south side thereof. That the watershed of said stream is very precipitous, so that in time of heavy rains to which the country is subject there are periods of floods or high water in the stream. That plaintiffs' said lot was situated on the south side of said stream and a short distance therefrom, and a short distance below the point where

*Page-number appearing at foot of page of original certified Transcript of Record.

said stream emerges from its canyon; and from said canyon to a point some distance below plaintiffs' said lot, the stream was confined by banks sufficiently high to contain the stream at all stages of the water even the highest floods. That a short distance below plaintiffs' said lot the stream at times of high water overflowed the banks and spread over a part of the said Casey-Shattuck Addition and thereby allowed a free outlet to said waters to the said channel. That in said natural condition plaintiffs' said lot was far above any danger of flood from said stream at any and all stages of the water.

IV.

That long subsequent to the sale of said lot to plaintiffs and long after they had built said house and improved the property, defendants, for the purpose of reclaiming a part of said Casey-Shattuck Addition and making the same marketable, to wit, that part thereof formerly subject to overflows, built a dam or bulkhead across said stream at a point about opposite plaintiffs' said lot, and from said dam, and a point opposite and across the stream therefrom, constructed bulkheads of logs and loose stone to Gastineau Channel at a point to the southeast, thus changing the course of said stream and deflecting it [2] sharply to the southeast in a curve around the west and south side of plaintiffs' said lot. That the new channel thus constructed was sufficient to carry the waters of said creek at ordinary stages of the stream, but was too shallow and too narrow and wholly insufficient to carry the waters at times of floods such as ordinar-

ily occur therein at times of heavy rains, so the stream as dammed and changed in its course by defendants became a danger and menace to plaintiffs' said property, of all of which defendants were fully warned and apprised before said structures were built, and that said structures and changes in said channel of said stream would inevitably cause damage to plaintiffs' and other property, which would otherwise be entirely safe at the first high water occurring after their completion.

Plaintiffs further allege that defendants were grossly negligent in the planning and construction of said flume in this: Said flume was planned and laid out with a depth of only five feet, and a width of thirty feet, or thereabouts, from its head to a point near its mouth, thereby being given a capacity of not more than one-half the capacity of the original creek channel it was to replace, and which creek channel defendants well knew, or could have known, was frequently taxed to its full capacity by flood waters coming down said creek, and at a point near its mouth and thence to the point of discharge said flume was narrowed to a width of twenty-five feet, thereby still further decreasing its capacity, and furthermore rendering it extremely likely, if not inevitable, that in time of high water the usual debris coming down said creek at such times would become choked at said narrows and thereby entirely prevent the flow of the waters through said flume at all. That the construction of said flume was too flimsy, weak, and insufficient to hold together during flood waters in said creek,

but on the contrary was such [3] as to permit the waters to undermine the walls of logs and wash them out into the flume and release the waters upon and against the adjacent ground.

V.

That on or about September 26th, 1918, there occurred one of the usual periodical heavy rains to which the vicinity is subject, which caused the waters of Gold Creek to rise and, pouring out of the canyon above on to the said Casey-Shattuck Addition and being unable to flow through the natural, original channel of the said creek and the flat because of the dam, was forced through and down said flume or artificial channel, and the said waters being laden with debris, and because of the narrowing of the said flume or artificial channel at or near its mouth, said channel became choked with said debris so as to prevent the greater part of the said flood waters escaping through said channel; and by reason of the obstruction caused by said choking and of the insufficient, flimsy and weak construction of the walls of said flume or artificial channel, a part of the logs and material out of which the walls of said channel were constructed gave way and were washed out into the said flume or artificial channel, which caused the waters and the full force of the current to be deflected and carry away a part of the easterly wall of said flume or channel adjacent to the plaintiff's said property and the deflection of said current being continued the same impinged upon, undermined, and washed

away the plaintiffs' said house, together with its contents and furnishings, and also washed away the earth and soil upon the lot itself so that a new and deep channel of the said Gold Creek now occupies the space formerly occupied by said lot and house, and the lot and house, together with its contents and furnishings were thereby completely destroyed. That the said damage and destruction was caused solely by the [4] *by the* construction of said dam and bulkheads in the negligent, deflective and insufficient manner aforesaid and would not have occurred had the said flume or artificial channel *had* not been built by defendants. That the value of the property so destroyed and the damage to the lot aggregates the full sum of Five Thousand (\$5,000.00) Dollars.

WHEREFORE plaintiff pray judgment for the said sum of Five Thousand (\$5,000.00) Dollars, with eight per cent (8%) interest per annum thereon from the said 26th day of September, 1918, and all costs herein incurred.

J. H. COBB,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska,
Division Number One,—ss.

O. Eikland, being first duly sworn, on oath deposes and says:

I am one of the plaintiffs above named; I have read the above and foregoing amended complaint,

know the contents thereof and the same is true as I verily believe.

O. EIKLAND.

Subscribed and sworn to before me this 2d day of June, 1921.

[Notary Seal]

J. H. COBB,

Notary Public for the Territory of Alaska, Residing at Juneau.

(My commission expires June 8th, 1923.)

Service of the above and foregoing complaint admitted this 3d day of June, 1921.

H. L. FAULKNER.

By S. CRANGLE,

Attorney for Defendants.

Filed in the District Court, District of Alaska, First Division. Jun. 3, 1921. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [5]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND and O. EIKLAND,

Plaintiffs,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN
SHATTUCK,

Defendants.

Answer to Amended Complaint.

Come now the above-named defendants, and in answer to the amended complaint of the plaintiffs on file herein, admit, deny and allege as follows:

I.

Defendants admit the allegations contained in Paragraph Number One of said amended complaint.

II.

Referring to the allegations contained in Paragraph Number Two of said amended complaint, defendants admit that the plaintiff A. Eikland purchased and owned Lot No. 6, in Block No. 209, and admit all the other allegations contained therein, except that the value of the dwelling-house and said lot was \$3,000.00, which said allegation defendants deny, and allege that the value of said dwelling-house was not more than \$1500.00.

III.

Referring to the allegations contained in Paragraph Number Three of said amended complaint, defendants admit that Gold Creek flows from the mountain range east of Juneau into Gastineau channel across said Casey-Shattuck Addition; admit that there are periods of floods in said stream; admit that the lot mentioned in said amended complaint was situated on the southeast side of said stream; admit that said lot was far above any danger of floods from said [6] stream during periods of ordinary high water in said

stream; and deny each and every other allegation contained in said paragraph.

IV.

Referring to the allegations contained in Paragraph Number Four of said amended complaint, defendants deny that they built a dam or bulkhead across said stream at any point; deny that they deflected the course of said stream; admit that they built bulkheads upon the banks of said stream; and allege that the channel of said stream was of sufficient capacity, and said bulkheads were so constructed that said channel could carry the waters of said stream at all times, including freshets and all periods of high water; deny that defendants were negligent in the planning and construction of said bulkheads, referred to in said amended complaint as a flume; deny that the channel after the construction of said bulkheads had a capacity of not more than one-half the capacity of the original creek channel; deny that the capacity of said channel was diminished by defendants in any particular; deny that the channel was narrowed near its mouth; and deny each and every other allegation therein contained.

V.

Referring to the allegations contained in Paragraph Five of said amended complaint, defendants admit that on September 26, 1918, a flood occurred, due to heavy and unusual rains, which caused the waters of Gold Creek to rise, and that said flood

damaged the property of the plaintiffs, and in this connection, defendants allege that said flood and said heavy rains were unusual, unprecedented, extraordinary, and such as had never before occurred in said vicinity, and such as could not have been foreseen by the defendants, or anyone else; and the defendants deny that the damage to plaintiffs property was caused by any act of defendants, but was due solely to an Act [7] of God, as aforesaid; and defendants deny that the value of the property damaged was \$5,000.00, and deny that the damage to the said lot and house aggregated the full sum of \$5,000.00, or any other sum in excess of \$1500.00; and defendants deny each and every other allegation contained in said paragraph.

WHEREFORE, defendants pray that this action be dismissed and that they recover from plaintiffs their costs and disbursements herein.

H. L. FAULKNER,
Attorney for Defendants.

United States of America,
Territory of Alaska,—ss.

I, Allen Shattuck, being first duly sworn, depose and say: That I am one of the defendants mentioned in the foregoing answer; that I make this answer for and on behalf of all the defendants; that I have read the said answer and know its contents, and that the facts stated therein are true and correct as I verily believe.

ALLEN SHATTUCK.

Subscribed and sworn to before me this 13th day of October, 1921.

H. L. FAULKNER,
Notary Public for Alaska.

My commission expires Nov. 14, 1922.

Copy received Oct. 15, 1921.

J. H. COBB,
Atty. for Plaintiffs.

Filed in the District Court, District of Alaska,
First Division. Oct. 15, 1921. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [8]

In the District Court for Alaska, Division Number
One at Juneau.

No. 1787—A.

A. EIKLAND and O. EIKLAND,
Plaintiffs,

vs.

W. W. CASEY, HENRY SHATTUCK and
ALLEN SHATTUCK,
Defendants.

Reply.

Now come the plaintiffs, by their attorney, and for reply to the affirmative defenses alleged in the amended answer, deny the same, and they especially deny that the damages to plaintiffs alleged in the

complaint were due to the act of God, or to any other cause except those alleged in the complaint.

J. H. COBB,

Attorney for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

O. Eikland, being first duly sworn, on oath deposes and says: I am one of the plaintiffs above named. I have heard read the above and foregoing reply, and the same is true as I verily believe.

O. EIKLAND.

Subscribed and sworn to before me this 17th day of October, 1921.

[Notary Seal]

J. H. COBB,

Notary Public for Alaska.

My commission expires June 8, 1923.

Filed in the District Court, District of Alaska,
First Division. Oct. 20, 1921. J. W. Bell, Clerk.
By ———, Deputy. [9]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND and O. EIKLAND,

Plaintiffs,

vs.

W. W. CASEY, HENRY SHATTUCK and
ALLEN SHATTUCK,

Defendants.

Judgment.

The above-entitled cause having come on regularly for trial on November 13, 1922, the plaintiffs being represented by J. H. Cobb and James Wickersham and the defendants by H. L. Faulkner, and both parties having announced that they were ready for trial, and a jury having been duly and regularly impaneled and sworn to try the issues in the above-entitled cause, and evidence having been introduced on behalf of both plaintiffs and defendants, and the jury having retired to consider of their verdict, and having returned into court on November 16, 1922, their verdict as follows:

“We, the jury, duly and regularly empanelled and sworn to try the issues in the above-entitled cause do find for the defendants.

J. W. LEIVERS,

Foreman.”

and said verdict having been duly filed herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by their complaint herein, and that the defendants recover from the plaintiffs their costs and disbursements incurred in said cause to be taxed by the clerk.

Dated this 18th day of November, 1922.

THOS. M. REED,

District Judge.

Filed in the District Court, District of Alaska,

First Division. Nov. 18, 1922. John H. Dunn,
Clerk. By ———, Deputy.

Entered Court Journal No. R., page 444. [10]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on the trial of the
above-entitled and numbered cause, the following
proceedings were had:

The plaintiffs to maintain the issues on their part,
introduced the following evidence:

First. The evidence of B. D. STEWART taken
on the former trial, March 24th, 1919, as follows:

Testimony of B. D. Stewart, for Plaintiffs.

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. B. D. Stewart.

Q. You reside in Juneau, Mr. Stewart?

A. Yes.

(Testimony of B. D. Stewart.)

Q. What is your occupation?

A. Mining engineer and mineral surveyor.

Q. You are an engineer and surveyor?

A. Yes.

Q. I will ask you if you have recently made any measurements, platting and survey of the ground of the Casey-Shattuck Addition to Juneau, lying across the stream know as Gold Creek?

A. I have.

Q. The last few days A. Yes.

Q. I will ask you if you have made a plat of that?

A. I did.

Q. From actual work done on the ground?

A. Yes. [11]

Q. Actual measurements made?

A. Actual measurements on the ground.

Q. I will ask you if this is the plat? A. Yes.

Q. Now, I will ask you to step down here, Mr. Stewart, and explain that map to the jury. Perhaps I had better first offer it in evidence.

Mr. COBB.—We will offer that in evidence.

Q. (By Mr. FAULKNER.) Mr. Stewart, you made this recently?

A. Just a day or two ago. (12—1)

Mr. FAULKNER.—No objection.

(Whereupon said plat was received in evidence and marked Plaintiff's Exhibit "A.")

The COURT.—It is offered as a plat showing the present conditions?

Mr. COBB.—What can be shown on a plat.

Q. (By Mr. COBB.) Now, Mr. Stewart, step

(Testimony of B. D. Stewart.)

down here where the jury can see it. Now when you made that survey where did you begin your work?

A. I began my work at a point marked on the plat No. 1, on the northwest side of 10th Street.

Q. Did you locate that point on the ground?

A. Yes.

Q. That is on the lot of what block?

A. On the southerly line of block 208, lot No. 8.

Q. Now, the map, so far as the blocks and lots are concerned, does that correspond with the official survey of the Casey-Shattuck Addition?

A. Yes, the blocks and lots are indicated on the map by a tracing from that official map, and my survey is tied to that by locating block corners on the ground.

Q. Now, the place marked "ribbed Channel," you have the westerly side of that indicated by a heavy alternate black [12] and white line—what does that indicate?

A. That indicates the cribbing of the cribbed channel which is still in place.

Q. That is still in place? A. Yes.

Q. Now, on the westerly side of the creek above that there is another heavy line, alternate black and white—what does that indicate?

A. That indicates also a piece of cribbing which is still in place.

Q. That is, it is there now, and do you know whether it has been put in since or not?

A. I don't know anything about that, no, but I

(Testimony of B. D. Stewart.)

know that the (13—2) southerly 60 feet of it has sagged down. I say it is in place—it is approximately in line with the old cribbing on the channel.

Q. Now, the place on the map here marked “Channel filled with stumps, boulders and debris”; what does that indicate?

A. That indicates the line of the original cribbed channel.

Q. Any of that left in there?

A. No, that is obliterated with the exception of a section at the lower end opposite and lying east of the School Reserve, block 220. At that point the tops of the piles and the sheathing on the side of the piles show at the surface. The channel itself is full of stumps, boulders and sand, but the very top of the channel is shown, and that channel indicated on the map is as it is on the ground.

Q. State, now, if you took any measurements to ascertain the dimensions, cross-section of the flume or artificial channel? A. I did, yes.

Q. Whereabouts were they taken?

A. At a point on the map marked by green line, lying at the [13] intersection of the cribbed channel with 10th Street, and marked C-D in green ink.

Q. What did you find its dimensions to be?

A. 150 square feet was the area of the cross-section—30 feet by 5, practically.

Q. I hand you a paper here and ask if you made that? A. I did, yes.

(Testimony of B. D. Stewart.)

Q. From a survey and actual work on the ground?

A. Yes.

Mr. COBB.—We will offer that in evidence.

Mr. FAULKNER.—We object to that. There is no testimony showing the witness' knowledge of any old original channel. It is marked "Cross-section of original channel." The witness is not qualified to testify that he knows anything about the original channel. (14—3)

Mr. COBB.—Just as he found it on the ground.

The COURT.—I do not think there is any objection to it provided it is sufficiently definite as to what he is talking about. It is what he considers the old channel on the ground, which he saw. Do you mean that this is a cross-section of some part of that map, Plaintiff's Exhibit "A"?

The WITNESS.—Yes; indicated in the same way on the map as it is here on the cross-section.

The COURT.—The objection is overruled because he has testified what the map is, and now he says that it is a cross-section of the map.

Mr. FAULKNER.—That is the point, yes. If that is a cross-section of this portion marked on the map we have no objection.

(Whereupon said cross-section was received in evidence and marked Plaintiff's Exhibit "B.")

Q. Now, Mr. Stewart, you say you measured the capacity of the flume, the original channel, at the point near 10th Street [14] marked with a green line on there. What did you find its capacity to be?

(Testimony of B. D. Stewart.)

A. The width was very close to 30 feet, and the depth averaged 5 feet.

Q. A cross-section of it, then would contain 150 feet? A. 150 square feet.

Q. Did you measure it at any other place?

A. The cribbed channel?

Q. Yes, the cribbed channel.

A. I measured the width of it, yes—not the depth, however.

Q. Whereabouts did you measure that?

A. Down where the top of the flume shows, opposite the School Reserve.

Q. What was the width of it at that point?

A. 25 feet.

Q. It narrowed 5 feet? A. Yes. (15—4)

Q. Did you measure its depth at that point?

A. I couldn't; it is full of boulders and things.

Q. It is filled up and you could not measure its depth. Now, from a point at or near the intersection of B Street and 10th Street, I will ask you if on the surface there is a channel, old channel, going from there down to the bay, as indicated on that map? A. There is.

Q. Just below there is there any other old channel lying off to the west, or right as you go down stream? A. Yes.

Q. Did you measure those?

A. I took a cross-section of the channel above where it branches.

Q. What was the cross-section there?

A. The area was 230 square feet.

(Testimony of B. D. Stewart.)

Q. What was the width? A. 125 feet.

Q. Now, did you measure it at any other place, the width of it—the width of the channel?

A. Yes.

Q. Whereabouts?

A. I measured it in numerous places. One place, for instance, [15] where the channel which I have marked on the map “Original channel” crosses 9th Street, between blocks 218 and 219—62 feet wide at that point.

Q. At the point here where it crosses 9th Street?

A. It is marked on the map; yes.

Q. Sixty-two feet wide there. Did you take the elevations that indicated the drop of the ground?

A. Yes, from 11th Street down to the bay I did. I am speaking of the cribbed channel.

Q. You took the elevations of the cribbed channel. What is the drop or grade?

A. It is approximately 2 per cent. (16—5)

Q. Where is that?

A. That is from 11th Street down to the channel—the intersection of 11th Street.

Q. That is 2 feet in a hundred?

A. About that. The bed is irregular and of course it depends on just where that point is taken in the channel, but as near as I could get, it is about 2 per cent.

Q. Did you take the elevations in the old channel? A. Yes.

Q. What is that? A. About the same.

Q. About 2 per cent?

(Testimony of B. D. Stewart.)

A. Yes—some sections are steeper and some are not so steep, but the average is about the same.

Q. Now, the cribbing you have in place there on the westerly side, as indicated on that map—that is all in place?

A. It is in place and intact, yes.

Q. Does that show the water or stream in the old channel?

A. There is no water flowing down there now, of course.

Q. Mr. Stewart, was this map and the objects on it drawn to scale? A. Yes.

Q. What does this indicate that you have marked “New Channel,” [16] across block 209 and the next block northwesterly of it?

A. That is a new channel which was formed by the flood.

Q. Now, did you find a small corner—a few square feet—of lot 6 in block 209, plaintiff’s lot, still intact? A. Yes.

Q. What is there on it? A. A fence post.

Q. Did you take the elevation of that?

A. Yes.

Q. As above what?

A. As above the channel there.

Q. How high did you find it to be? (17—6)

A. About 6 feet.

The COURT.—Above the bottom of the channel?

The WITNESS.—Yes, about the bed of the channel.

(Testimony of B. D. Stewart.)

Q. (By Mr. COBB.) Where is the bulk of the water in the creek now running?

A. It is pretty well frozen over now—I couldn't say—I think it is running down this channel right here (indicating).

Q. A large part of it has been shut off by this bulkhead from coming down the new channel?

A. Yes.

Q. Now, the space that you have marked "Washed out area, covered with boulders and debris," just tell the jury briefly what there is in there.

A. Well, there are boulders and rocks.

Q. What about the elevation of it above the bottom of the channel?

A. It is several feet,—nearly all of that area is several feet above the channel.

Q. And the channel is cut deeper?

A. Several feet deeper—I should say it would be 5 or 6 feet deeper.

Q. Now, along the easterly border of what you have marked the "New Channel," on the north side of 10th Street down past 9th Street, what is there along that easterly side of that channel there?

A. There is a cut bank along that side of the channel. [17]

Q. About 6 feet high?

A. Well, it runs 2 or 3 feet high I should say, at 9th Street—the southerly side of 9th Street; and you notice on the map there is a point marked "House"—that is where the house is overhanging the edge of the bank. Between that house and 10th

(Testimony of B. D. Stewart.)

Street the bank is in the neighborhood of 10 feet, I should say, above the bed of the channel.

Q. That is, the cut bank is about 10 feet high.

A. Yes.

Q. Now, there is only one matter on this I believe you have not (18—7) testified to. Referring now to Exhibit “B,” you have figured out here 230 square feet and 150 square feet—what were those put on there for?

A. It is merely a graphic representation of the area of the two cross-sections so that they can be more easily compared.

Q. Now, as an engineer and surveyor, Mr. Stewart, can you say what would be the conditions—supposing a flood that would practically fill the cribbed channel as it existed to its capacity and show a rise of 6 inches more—in fact, over the top of it—in other words, where it would take a channel 6 inches higher, under the same width, to carry the flood waters, would there be any difference in the amount of the rise in the same flood in the new channel?

A. Yes, on account of the difference in the width. In other words, the same amount of water would be distributed over a much wider space.

Q. The same flood would by no means be so high? A. No.

Q. How would you arrive at the difference, in proportion to the width?

A. The area—the area and the width.

(Testimony of B. D. Stewart.)

Q. In other words, you would get the area by multiplying the width by the depth. A. Yes.

Q. Now, say that this channel, this natural channel, had a [18] width of 60 feet, and the cribbed channel had a width of 30 feet, its full capacity, and there was sufficient flood to raise up in the cribbed channel one foot above that, what would be the rise in the natural channel? A. 6 inches.

Q. Just half?

A. Yes; that is, allowing the same grade, and the other things being equal.

Q. How did you find that? (19—8)

A. The grade is about the same—practically the same.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Stewart, will you indicate here on this plat as nearly as you can where the Gold Creek bridge is situated—about where—in what direction?

A. I would say about there (indicating).

Q. That is not indicated on the plat? A. No.

Q. Of course the stream is not indicated there as it comes out under the Gold Creek bridge?

A. It is more easterly and westerly.

Q. What is the difference in altitude between the mouth of the channel down here and where it would come out under the Gold Creek bridge?

A. Why, from what I know of the elevation on this section of the map, I would say at least 50

(Testimony of B. D. Stewart.)

feet—50 or 60 feet.

Q. Now, Mr. Stewart, you have marked there a channel which you call on the map "Original Channel." Now, you say that plat was made within the last few days? A. Yes, sir.

Q. Were you here at the time of the flood, September 26, 1918? A. No, I was not.

Q. How long after that did you see the ground that you have shown on the plat? [19]

A. I didn't see it until the first of March of this year.

Q. And you say the channels were considerably filled with snow and ice at this time?

A. No, there is a covering of about 3 inches of ice there now. You can see the water running through in places.

Q. Then, since you were not here, you don't know whether this was the original channel or a channel caused by the flood? (20—9)

A. Yes, I have been down there before.

Q. Did you make any measurements of it before?

A. No. I will state however, that channel does not show any recent signs of being cut out.

Q. It has not been changed any?

A. Not to amount to anything; there are still alders and bushes in there.

Q. Now, you have given us the measurement of the channel at this point—how deep is the channel at that point?

A. I didn't take the cross-section—that is merely the horizontal distance between the banks.

(Testimony of B. D. Stewart.)

Q. Now, you gave the position of a post on Mr. Eikland's lot which you say is still standing, and you said that it is about 6 feet above the bed of the creek? A. About that.

Q. That is 6 feet above the bed of the new channel? A. Yes, sir.

Q. What portion of that new channel?

A. Opposite the fence post.

Q. Did you take the elevation of the fence post from the nearest point to the bed of the new channel?

A. It is not an exact right angle, but very close to it.

Q. Now, as a matter of fact, Mr. Stewart, this that you have marked "New Channel" is considerably steeper next to the fence post than it is at any other portion, isn't it? A. Deeper?

Q. Yes. A. No. [20]

Q. Isn't the water still flowing in there now?

A. I wouldn't say as to that—I didn't notice.

Q. You don't know whether there is any difference in the depth there or not?

A. Any difference in the depth? (21—10)

Q. The new channel is deeper as you come to the fence post? A. You mean next to the cut?

Q. Yes, next to the cut it is deeper.

A. I didn't notice that.

Q. But this measurement of 6 feet is from the fence post to the nearest point below the bank?

A. I had it set there at some point—I couldn't say just now where it is—I couldn't say exactly,

(Testimony of B. D. Stewart.)

but I know it is right near the fence post—you might say opposite the fence post.

Q. Now, you say, Mr. Stewart, that this depicts the bulkhead that is still across that channel?

A. Yes.

Q. Does that extend clear across that channel as it is shown there?

A. As nearly as I could identify the channel it is still across.

Q. And it only extends across what you have marked as the original channel?

A. Yes. I will state, too, about that original channel—that follows approximately the same line as being the course of Gold Creek as on those official plats of the Casey-Shattuck Addition, except that it is a different width.

Mr. FAULKNER.—Except it is a different measurement. That is all.

Redirect Examination.

(By Mr. COBB.)

Q. You have put on this plat the actual width as you found it on the ground? A. Yes. [21]

Q. And in the official plat, from which you put in the lots and blocks, the old original course of Gold Creek is indicated on there?

A. It is, yes.

Q. And it is substantially the same as the other except the full width is not shown. A. Yes.

Mr. COBB.—That is all.

(Witness excused.) (22—11)

Second. The testimony of A. EIKLAND taken on the former trial March 24th, 1919, as follows:

Testimony of A. Eikland, for Plaintiffs.

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. A. Eikland.

Q. Are you one of the plaintiffs in this case?

A. Yes, sir.

Q. Who is O. Eikland, the other plaintiff?

A. O. Eikland is my brother.

Q. You and your brother bought lot 6 in block 309 of the Casey-Shattuck Addition to Juneau from the defendants in this case in what year?

A. 1913.

Q. What time in the year?

A. We entered into a contract—I don't know when it was dated, but we started to build there the middle of April.

Q. It was early in the year, then—I don't care anything about the exact date.

A. It was early in the year—in the spring.

Q. Did you go down and look at this lot?

A. We did.

Q. What sort of a lot did you find it to be? What was on it?

A. It had a number of stumps there—perhaps more than a dozen stumps on the lot, and there were a number in the alley back of the lot. They were

(Testimony of A. Eikland.)

from small stumps up to perhaps 6 feet in diameter—spruce stumps.

Q. Now, did you notice at that time Gold Creek flowing past there, near it? A. Yes.

Q. Where is Gold Creek from this lot? Which direction does it [22] pass it? (23—12)

A. I beg pardon—I didn't catch it.

Q. From your lot does it pass east or west or how? A. It passes west of it.

Q. Now, how high above the level of the channel of Gold Creek was this lot—the surface of it?

A. Approximately 21 feet.

Q. Now, was there any indication of there ever being a stream across it, or flood waters going over it, or anything of that kind?

A. No, I didn't see any; there was grass growing, and small trees and brush growing over the lot in places; some of it had no trees on it, but there was grass all over the lot; there hadn't been no indication of a flood for a long time.

Q. Which way does your lot slope. Does it slope towards the channel or from the channel?

A. It sloped toward sea level—towards the channel in a southerly direction.

Q. About how far away was Gold Creek from your lot. Come to this plat and point out to the jury where your lot is.

A. It is lot 6—that is the lot (indicating).

Q. The corner lot, on the corner of B Street and 9th Street? A. Yes, sir.

Q. The northeasterly corner, is that right?

(Testimony of A. Eikland.)

A. You are mixed up, no—northwesterly.

Q. On the north side of B Street? A. Yes.

Q. And on the easterly side of 9th Street?

A. That would be it.

Q. Now, point out to the jury where Gold Creek ran at that time.

A. Gold Creek ran down this channel here marked "Original Channel." There was a very little water at that time—hardly any, because you could walk across with low shoes at any time—there [23] was hardly any water.

Q. Early in the year? (24—13)

A. At this time when the frost hadn't gotten out of the ground yet there was hardly any water, like it is now. You could cross the creek there, from one rock to another, you could cross with low shoes—ordinary thin shoes, you could cross without getting your feet wet, but you would have to be careful.

Q. Did it run down then what is marked "Original Channel"? A. Yes.

Q. Was there any other channel, old channel, running off towards the west, that is marked there "Old Channel"?

A. There was an old channel that appeared to be dry for some time going down towards the baseball ground, marked here "Old Channel"; approximately, as near as I can see on the map run down there, but there hadn't been no water, it seemed like, for some time, because it had formed a little small growth of alder and grass, but there was

(Testimony of A. Eikland.)

some gravel, showing that there had been water some years back.

Q. Now, I will ask you to point out to the jury about how far towards Gold Creek and up the line of B Street the high ground extended. Was all of your lot on high ground?

A. All of my lot was high ground, and the ground came across approximately, well, I would judge, three-fourths of a lot on this corner, and approximately a third here, or something like that. There is an alley here—12 foot alley—which is shown here. The high ground started approximately over here, $\frac{2}{3}$ or maybe $\frac{1}{2}$ a lot from the alley, and the lot directly behind—there was 5 lots there on that street—it cut approximately across here. I always judged from the line marked fence, as being the next lot, of course, on account of there being only four lots here, and the lots behind the line was 10 feet off this way from the corner of our lot, so I suppose the corner [24] of my lot in a direct line there would be two-thirds of a lot directly back of my fence, on this side (25—14) of the fence, and there would be approximately a third of a lot right next to B Street. These lots in here was the only 50 feet lots in the tract—the rest of them was 40 feet.

Q. Now, then, the surface of B Street between block 209 and the next block southwest,—I don't know what that is numbered—

A. 213.

(Testimony of A. Eikland.)

Q. 213, how was that compared with the level of your lot?

A. The level of B Street opposite my lot at this corner was a little lower, because that is filled in in the front approximately 2 feet. Originally it was level with the street, but it dropped off a little bit right there, and I filled that in. My lot was approximately level all over the lot—perhaps a little higher in this corner.

Q. How far across B Street did the high ground extend?

A. The high ground extended all over the next block.

Q. Block 213?

A. Yes, and over to the edge of the flume. It wasn't a flume at that time, but over in here—some place along that lot, where Gilbert's house stood, to the corner in the opposite block, across the street, and it was approximately the same level—all level ground along here.

Q. Along the surface there where the flume was afterward put, was there any old channel—a small channel? A. There was a small channel there.

Q. Carried water at high water?

A. At high water.

Q. Now, that was the condition at the time you bought, you say. Was there any change made in reference to the channel of the stream after that?

A. In the fall of 1914 Casey and Shattuck started to build this bulkhead that shows on there. [25]

Q. Did you have any conversation with any of

(Testimony of A. Eikland.)

them about it at that time? (26—15)

A. Practically the only one I knew at that time to do any business with, or the only one I ever did any business with was Henry Shattuck. I always dealt through him, and when I had any deal to make I went to him, and I did protest to Henry Shattuck himself about putting that flume towards my property—told him it would endanger my property and I was opposed to it.

Q. What did he say about it?

A. Just the way he spoke I couldn't remember, but he stated they had a right to build that, and he was going to construct that channel, and when they got through with it it was going to improve the property down in the flats.

Q. And they went ahead and built it?

A. They went ahead and built it.

Q. Was the whole thing finished in 1914?

A. No, sir, they worked through the winter and the spring.

Q. Was it finished by the summer of 1915?

A. It was finished by the time the high water started. As near as I can recollect, they had to hurry with the last on account of the water rising.

Q. That was towards spring when the water began to run? A. Yes.

Q. Then as I understand, in the spring of 1915, they had the new channel constructed, did they?

A. I don't know whether it was constructed by spring, but it was constructed between spring and the time the water got high.

(Testimony of A. Eikland.)

Q. You don't know just when it was finished?

A. No, I don't know just when it was finished.

Q. Now, indicate on this map to the jury—point out where [26] the new channel ran.

A. The confined channel?

Q. Yes.

A. The confined channel ran the way it is indicated on this map—ran through here, down to Willoughby Avenue—down to this point (indicating). (27—16)

Q. It had an elbow at block 213, as indicated there, just opposite your property? A. Yes, sir.

Q. Now, was it constructed across the old channel, as the creek originally flowed at the time you bought?

A. There was a bulkhead of logs constructed—a double row of logs constructed, with cross-pieces every 8 or 10 feet stuck in with drift bolts. The piles were placed lengthways along the side of the creek, and were placed approximately 4 feet apart, and the space in between was filled in with gravel and butts of piles they sawed off and threw in.

Q. What formed the inside wall of the new channel?

A. These logs, with the butts of the cross-pieces sticking out into the channel.

Q. And it was very much like—looked like the wall of a log cabin, did it?

A. Looked very much the same thing as the wall of a log cabin.

Q. Now, in the fall of the year 1915 did they have

(Testimony of A. Eikland.)

any high water.

A. There was a good freshet in August—about the middle of August, 1915.

Q. You don't fix the exact date? A. I do not.

Q. Anything happen to the flume then?

A. The flume busted right directly above the 9th Street bridge, and all the way down.

Q. Just point out to the jury where it broke there. [27]

A. It broke through there, right directly above 9th Street, at this point here (indicating); some of the water escaped through down here, and the flume was suspended in the air not less than two or three feet where the water ran under it.

Q. That is the westerly wall of it.

A. The westerly wall.

Q. Was undermined and the water escaped. I will ask you if there is a slope out here, towards the old channel—towards the (28—17) south and southwest so the water escaped?

A. There was slope on the top of the bank. The top of the bank was higher than the ground below there down towards the old channel—it is the slope of 9th Street, as everybody is acquainted with—there was quite a slope down from there.

Q. At that time did they have the same kind of an embankment on the east side of the new channel? A. They did.

Q. Did that hold? A. That held.

Q. That flood did not damage you any at all?

A. It did not.

(Testimony of A. Eikland.)

Q. How did that compare with the flood of 1918?

A. Well, I don't consider that flood as large as this.

Q. It wasn't quite as high—it was a good big freshet, however? A. Yes.

Q. After it broke out in 1915 did the defendants do anything toward putting it back. What was done about that by the defendants, if anything?

A. They repaired it with slabs they hauled up from the sawmill—long slabs, the way they come from the saw—they repaired it, and those were stuck down to close the holes under it, and then they throwed in some cement sacks filled with sand, and put some behind the flume, and put some rocks up directly across the 9th Street bridge so as to strengthen the flume that had washed out, and closed up the gap. [28]

Q. And during the years of 1916 and 1917, then, was there any high water to speak of?

A. There was no high water to mention.

Q. Those were dry years?

A. Yes—they were not dry years, but there was no large amount of water coming at one time.

Q. Now, in 1918—were you out there on the 26th day of September, 1918? (29—18) A. I was.

Q. You were watching the flood waters?

A. Yes.

Q. What time did you begin watching them in the morning?

A. It was nine o'clock when I got there. I was working and I had business on Willoughby Avenue,

(Testimony of A. Eikland.)

and I noticed the people was congregating there, and I investigated, and I went up to my house to see what was going on.

Q. At that time were the waters up to your lot?

A. No, sir.

Q. Where was the water going at that time?

A. It was going—most of it was going down the flume at 9 o'clock when I got there, and shortly after it began to spill over on the side—both sides.

Q. Did any part of the flume go out that day, and if so, where was the first place where the embankment on the side of the flume gave way?

A. The first place that I noticed giving way was approximately at this point. The flume broke at this point, or very near here, and half of it come out this way, and the logs sticking out like they were, one end swung around like this, and this swung in the flume and dammed across the flume.

Q. That was the east side?

A. The east side of the flume broke at that point.

Q. After that what happened?

A. The flow of water was shot up against the bank on this side, and dug out the bank like a hydraulic turned against it at that time, and deposited sand up against the flume on this side—
[29] what was left of it.

Q. What did that flood do to your property there?

A. The water swung against the bank there dug away the high ground back of my lot, dug out the alley and began to dig out my lot, dug it out

(Testimony of A. Eikland.)

gradually, undermined it, and tore the house away.
(30—19)

Q. How much of your lot is left there now?

A. There is 5 feet along the fence one way, and 5 feet the other way—there would be a triangle, and the sides of the triangle would be 5 feet.

Q. That is all of the lot that is left?

A. That is all of the lot that is left.

Q. Is there any of your house left? A. No, sir.

Q. What became of it?

A. Carried down the creek; it stood there for awhile—it was all twisted and bent, and another house came down and smashed it, and part of it was took away and part of it is down there now—pieces of it.

Q. About what time did your house go.

A. I cannot tell.

Q. As near as you can recall?

A. Some time that afternoon about 2 o'clock—I was too excited to notice the time.

Q. You were there all the time up to the time your house went? A. I was, from 9 o'clock.

Q. I will ask if at any time the surface of the flood waters rose as high as the surface of your lot?

A. No, sir.

Q. The lot, then, was destroyed by this undermining of it?

A. It was destroyed by this undermining.

Q. Very well. Just go ahead and explain to the jury what you (31—20) saw and what happened. Tell it just as you saw it there.

(Testimony of A. Eikland.)

A. Well, the flume broke at the point mentioned, approximately here at this point, and part of the logs in this flume doubled [30] out in this direction, across like that, and part were too long to swing completely around, and so they were lodged at an angle about like that—they were too long to be permitted to swing clear around, and the debris came down and deposited in these logs that stayed in this direction, and caused the water to run out of the flume on this side; and this side was intact, and the water washed up against the bank here, and kept digging and digging, and the channel shifted over and dug out all the ground back here.

Q. What prevented the flood waters from going down the old original channel and escaping into the sea?

A. The flume across this channel here; those logs there prevented that because it didn't break.

Q. I will ask you if that was strengthened by the defendants in 1915—that part of it?

A. It was strengthened very close to this point; I don't know whether it was strengthened right directly at that point there—it was strengthened this way, and there was a number of rocks behind.

Q. About what was the length of the logs that came out of the flume embankment as compared with the width of the flume itself?

A. Well, the logs coming out of there was more than twice the width of the flume—they were very long logs, and there was logs there—I mentioned

(Testimony of A. Eikland.)

at the time they put them in—I admired the length of those piles, and the straightness of them, because I am interested in that work, and there was some 85 feet long in that flume, because I measured them.

Q. Did you notice at any time during the high water there the condition of the flume below 9th Street—from there on out to the sea? (32—21)

A. After the flood or before?

Q. During and after the flood. [31]

A. Well, it filled up with debris and started to choke up down by Willoughby Avenue.

Q. Where is Willoughby Avenue? It is not shown here—it is out on the tide flats.

A. I should judge this is Willoughby Avenue here. There is the native hospital standing, and this is Willoughby Avenue—should be approximately here.

Q. It is on the tide flats?

A. It is on the tide flats.

Q. You say it choked up down there?

A. Started to choke up down there, and the water was flowing here, and the flume choked up from there on up to the bridge, and it was filled up full of debris, rocks, stumps and parts of buildings.

Q. Is it full now? A. It is full now—level.

Q. Now, from what you saw there, if that flume had not been built there, could those flood waters have escaped to the sea down the old channel without injuring you?

(Testimony of A. Eikland.)

A. In my opinion they would.

Q. Is that obvious from looking at it?

A. Sure.

Q. I hand you a photograph and ask you if that correctly represents (38—27) the condition of the flume down there prior to the flood, close to the creek? A. It does.

Q. Just step down here a minute and point out to the jury where your house was.

A. Right there (indicating).

Q. Is the old original creek channel where the creek flowed shown there?

A. Here is shown the old creek channel running through here, down at about 8th Street.

Q. Show the other old channel to the west of that.

A. Here is the old one you spoke about—that has not been running any for some time—running down towards the old ball [32] grounds.

Q. Do you know when that picture was taken?

A. From the houses that are there and the things that are there, it has been taken between April 1915 and October, 1915.

Mr. COBB.—I think I will have the photographer here to tell just exactly when it was taken. I will offer it in evidence at this time, and call the photographer later.

Mr. FAULKNER.—All right.

The COURT.—That is offered in evidence as showing what?

(Testimony of A. Eikland.)

Mr. COBB.—Showing the condition of the flat prior to the flood.

The COURT.—How long prior?

Mr. FAULKNER.—1915, the time it was finished.

The COURT.—It will be admitted.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit "D.")

Q. Now, I hand you another photograph and ask you what that represents?

A. This represents the same piece of ground, or nearly the same piece of ground, after the flood—I don't know how long after, but not very long after—before the city put in their repair work across here, so that it could not have been over, approximately, ten days after—between a couple of days and ten days after. (39—28)

Q. Does that show correctly the way things looked down there at that time. A. It does.

Q. Step down here a minute. I will ask you about where on this photograph your house stood before it was washed away?

A. There is the corner post that the surveyor took his dimension on, and the small picket fence running approximately 5 feet, might be more and might be less—that little corner of ground. That house stood 21 feet from this fence over this way, and about 7 feet from this B Street, and about 24 feet from 9th Street, is where the house stood.
[33]

Q. Now, indicate on here about where the flume first went out on the east side.

(Testimony of A. Eikland.)

A. It shows here, where the pile is still shown here. Part of the piles swung around and the other part swung in the flume, coming across like a wing dam, causing the water to bank over here. At first it started here, and washed up against this part of the bulkhead.

Q. And kept on working over?

A. Yes; this house floated in, and this high ground, showing there was deep water at that time.

Q. Now, on this plat here there is indicated a line of bulkhead across the upper end of the new channel—when was that put in?

A. It was put in in the first part of October. It was constructed there by the Street Commissioner, to work the water off from the native hospital. They were going to have it repaired and the water was running down so they couldn't excavate there, and they constructed this to carry the water away from the hospital.

Q. Turned it down this channel?

A. Turned it down this channel, and turned it down along here—turned it down this way.
(40—29)

Q. And this bulkhead, shown on the plat, Plaintiff's Exhibit "A," as crossing the new channel, that Mr. Stewart found there at this time, that has been built since that?

A. It has been—the greater part of it from up there has been put in since the flood and has been destroyed since, also.

Q. What destroyed it?

(Testimony of A. Eikland.)

A. A little freshet came along there just after *the* completed it and partly wrecked it again.

Q. Partly wrecked it?

A. They put up a little temporary affair thinking there would [34] not be any water any more for a year, and a little freshet came along and wiped away the affair they had in there, and the water still went out around the hospital.

Mr. COBB.—We offer that in evidence.

Mr. FAULKNER.—No objection.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit "E.")

Q. You are familiar with all of the ground from your place on out to the beach, indicated at the lower end of the plat here—are you? A. I am.

Q. I will ask you to tell the jury which way the ground slopes from your house on out towards the beach—what is the general slope of the country?

A. Well, the ground slopes down this way, and this way, approximately that angle—about this way.

Q. Practically towards the southwest? (41—30)

A. Yes, it would be the southwest.

Q. Was there any ground southwesterly from your lot that was as high as your lot was?

A. No, there wasn't.

Q. How long have you been in this part of Alaska, Mr. Eikland? A. Six years.

Q. Where did you come from here?

A. Seattle.

Q. You had never been in Alaska before?

(Testimony of A. Eikland.)

A. Yes.

Q. You had lived in Alaska before that?

A. About six months.

Q. When was that? A. 1906.

Q. You were here about six months in 1906, and went back to Seattle, and came back in the spring of 1913?

A. I wasn't here in 1906—I was in Haines—Fort Seward.

Q. You never lived in Juneau prior to the spring of 1913? A. No, sir.

Q. You have lived here continuously ever since?

A. Yes.

Q. I think you testified yesterday that you bought this lot [35] some time in the spring of 1913? A. Yes, sir.

Q. At that time were there any buildings to speak of—any settlement on the Casey-Shattuck flats?

A. There wasn't any residences, but only a small house in the same block—I don't remember the lot—it was on the opposite corner, facing 9th Street, in the same block.

Q. All the property then, south and southwesterly of your lot was unoccupied, no buildings on it?

A. There was no buildings whatever that I remember southwest, or anywheres in the flats.

Q. During the time you have been here you have seen freshets in (42—31) Gold Creek prior to September, 1918? A. Yes, sir.

Q. When was the first one that you saw there?

(Testimony of A. Eikland.)

A. The first one that I saw was in August, 1913.

Q. Was that as high as the one that occurred in September, 1918?

A. Well, I wouldn't be able to state whether it was or not; it was in the middle of the night when it was at its height and we couldn't see just what the water was—there was quite a freshet—quite a lot of water coming down the creek at that time, but it was in the night and it was dark.

Q. Which way did that water escape?

A. It escaped down through where the old channel was.

Q. There had been no change in the original channel at that time?

A. There wasn't no change

Q. Did that damage your property any?

A. No, sir.

Q. When was the next one you saw?

A. The next one I saw was in October, 1913.

Q. Just describe that freshet to the jury.

A. Well, there was a good heavy rainfall for about three days, and there had been previous to that some fresh snow in the mountains, about halfway down the mountain side, and we got one of [36] those warm winds we occasionally get here, and this snow all melted, and with the rain that came down at the same time there was an awful amount of water in Gold Creek—I think there was more water in Gold Creek then than there was last fall—September, 1918.

(Testimony of A. Eikland.)

Q. Did that flood do any damage to your property? A. No, sir.

Q. Which way did it escape?

A. It escaped—the biggest part of it escaped down where it did in August, and possibly a part of it went down through by the power-house there. There was kind of a dry creek there, and it flooded a good part of that dry creek bed all through there. (43—32)

Q. Southwesterly from your house, down the old channel, in that direction? A. It did.

Q. Was there any property at all down there at that time to be damaged by it, outside of yours?

A. There was no property that I know of—there was no houses at that time; there was a few tents scattered around the flats, but there was no property to be damaged that I know of because there was no buildings there at that time.

Q. Did that flood make any impression upon the high ground bordering the stream, the old original channel, on the side opposite your property?

A. It possibly did a little digging there on the east side, up there towards 10th Street, up in that vicinity, and around there—I didn't pay a great deal of attention to it, but there was possibly some excavation done by the creek there.

Q. About how far away from your property was the nearest point of the flood waters on that occasion?

A. Well, it was possibly 20 feet, or something

(Testimony of A. Eikland.)

like that, in the nearest place where the water was from the back end of the lot—approximately something like that. [37]

Q. Now, I believe you testified yesterday that this flume was built in the winter of 1914 and '15.

A. Yes, sir.

Q. And the next high water you said was in 1915? A. It was.

Q. And the lower part of the flume broke and escaped—has there been any freshets to speak of since 1914 up to September, 1918?

A. There wasn't enough freshet since that time that we noticed it. There was freshets, but there wasn't anything that came down the flume to speak of.

Q. Nothing like the freshets of 1913 or 1918?

A: No, there wasn't.

Q. You know nothing of your own knowledge about the condition of (44—33) the floods prior to 1913? A. I do not.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Eikland, do you know who owned that property out there at the time you went and settled on it? A. Where I built the house?

Q. Yes, the whole tract.

A. They—Casey and Shattuck owned it.

Q. Do you know in what proportion they owned the respective interests?

A. I was told Casey owned half, and the

(Testimony of A. Eikland.)

Shattuck brothers owned the other half together, one quarter each.

Q. Henry Shattuck owned a quarter?

A. So I understood.

Q. And he was the man to whom you complained at the time the flume was built? A. Yes, sir.

Q. Did you say anything to Mr. Casey?

A. I did not.

Q. Do you know where Mr. Shattuck is now?

A. I do not. [38]

Q. Do you know whether he is in town?

A. I understand he is out of town; I don't know where he is.

Q. You didn't say anything to Mr. Casey?

A. I did not.

Q. Did you say anything to Mr. Casey or Mr. Allen Shattuck or to Mr. Henry Shattuck about getting the contract to build the flume yourself?

A. I did not.

Q. Not a word? A. No, sir. (45—34)

Q. Didn't you make a bid on it? A. I did not.

Q. You say that when you went out there the morning of the 26th of September, you went up to your home, and it was about 9 o'clock, was it?

A. About 9 o'clock.

Q. And at that time the water was spilling over the flume? A. Some.

Q. Was there any water on the outside of the flume flowing down the bed of the creek, or flowing down outside of the flume?

(Testimony of A. Eikland.)

A. Sure, it had spilled over and was running down outside, naturally.

Q. Was there any other crack there outside of the flume?

A. I didn't notice any—it spilled over and was running down on both sides—there wasn't very much at that time.

Q. Whatever water there was was coming from the flume?

A. It did; there was water leaking through it—it always did leak through—it wasn't water-tight—water always seeped through it.

Q. There was not very much water outside at that time? A. Yes, sir.

Q. What time did the flume give way, did you say? A. Between 10 and 11 I should say.

Q. Some time after you went home?

A. Yes, some time after.

Q. And after that the waters continued to rise, did they? A. It did.

Q. Did you notice anything else—that any other part of the flume [39] broke—did you happen to notice? A. I did not.

Q. You just noticed this one place?

A. I noticed the flume breaking up there, and after that there was such a lot of water we couldn't see just where it broke, but (46—35) there was so much water rushing through there all of a sudden that I surmised that is where it broke.

Q. That is just what happened—you could not see just where it did break?

(Testimony of A. Eikland.)

A. No, we couldn't see where it pulled out, but we saw the water come through all of a sudden.

Q. You knew the water started to come through there? A. Yes, approximately at 10th Street.

Q. That is on this side of the flume, opposite your house, about 10th Street? A. Yes, sir.

Q. That is the first break you noticed?

A. Yes, sir.

Q. You were there before any of this flume was built? A. Yes, sir.

Q. Was this the only channel there was there before the flume was built?

A. Yes, sir; this was the only channel I noticed when I came out here, although I stated a while ago in the flood of 1913, in October, there was such a volume of water that it filled all this space, and possibly some of it flowed down—I don't know just where that would be, and part flowed down by the power-house, where there had been water from time to time at high water—a big part of the water run down there.

Q. There was no creek bed at that time in this portion that is marked on here "Cribbed Channel"?

A. Not that I noticed. There was here at this point, because this is where it originally was—this is where it broke across the cribbed channel at that time.

Q. But from the intersection of the cribbed channel with what [40] you have marked "Original Channel" down towards the beach there was no creek-bed at all?

(Testimony of A. Eikland.)

A. There was no creek-bed, except as I stated, dry places where the water in extreme high water would run down through. (47—36)

Q. That bulkhead, then, was built practically on dry land? A. It was.

Q. And the creek was diverted over the dry land?

A. Yes.

Q. You stated your lot there was 21 feet above the bed of the creek?

A. I understood above sea level—that is what I stated.

Q. You say it was 21 feet above sea level?

A. Yes, sir.

Q. But you didn't say how far it was above the bed of this creek? A. I did not.

Q. You don't know that? A. No, I do not.

Q. Do you know how far the surface of the lot that remains is above the bottom of the creek as it now is?

A. No, I don't know anything about it, except Stewart, the surveyor, said it was 6 feet. I haven't measured it—I haven't used instruments down.

Q. In this space marked on the map "Washed out area covered with boulders and debris," describe to the jury what is there.

A. All that shows there is what we call coarse gravel, and boulders—might be 6 inches in diameter—the biggest part that shows there is boulders and gravel—I think that is all I noticed laying there—there might be a few plants that was deposited by the water there.

(Testimony of A. Eikland.)

Q. There are no trees or growth of any kind covering that—it is all bare?

A. I have an impression that there is some laying up here, very close—must be about here—some that fell down from here—I don't know where it come from.

Q. Do you know anything about this cribbed bulkhead that [41] is marked on this plat, that extends across what is marked as the New Channel,—do you know whether that extends clear across the top of that channel? (48—37)

A. I do not; Steve Raymond had a gang there extending this across there to keep the water from running down and going on to the Native Hospital property, and I know for the reason that Hawkesworth employed me to repair the hospital, and Hawkesworth was working in harmony with the Street Committee to get them to work this water off down there so he could excavate under the hospital.

Q. Where is that hospital?

A. It must be about here.

Q. What block is that?

A. 220, and the native school is erected on this part of the lot, and the hospital on this part, and the water was running through there, about here, and running all around so we couldn't excavate there, and he extended this part of the flume across in this direction, for temporary work, to keep the water from going down this way, and he diverted the water at this point, down through

(Testimony of A. Eikland.)

here, to keep it from going through here.

Q. Now, Mr. Eikland, how far is it, approximately, from where your house was to the Gold Creek bridge that Mr. Stewart says is not marked on this plat—approximately about how far?

A. That is pretty hard for me to give.

Q. Would it be 100 or 500 feet?

A. It must be 500 feet—possibly more—maybe 600 or 700.

Q. How far would it be from where your house was to tide water down at Willoughby Avenue?

A. That must be about the same distance—about 500 feet.

Q. Your house was about halfway?

A. About halfway.

Q. Where is Willoughby Avenue on that map?

A. It must be about here.

Q. It is not shown on that plat? A. No.

Q. How is Willoughby Avenue constructed there?
(49—38) [42]

A. Constructed on piles, with caps on top, and planks on top of them.

Q. And at the mouth of his part here that is marked "Original Channel," of this creek that flows on down past the hospital, approximately about how high would the caps be from the beach—the caps of the piling on which the street is built?

A. Over at the original channel?

Q. Yes, and coming all the way along here?

A. It varies a great deal; Mr. Casey piled in a lot of property there and planked it over and it

(Testimony of A. Eikland.)

is still standing, and it is filled in a great deal now—it must have been approximately 4 or 5 feet around this point—it was more over here. I walked under there several times—it must have been 7 feet approximately—I walked under there before the flood.

Q. About 6 or 7 feet? A. It must be.

Q. And were the piles pretty thick in there?

A. Mostly about 10 feet centers—approximately 10 feet centers.

Q. You stated this portion of the channel, I think—either you or Mr. Stewart stated—is filled with stumps, boulders and debris, the lower end of it, down towards Willoughby Avenue—you have seen that, have you? A. Yes.

Q. Will you describe to the jury what is in there to the best of your recollection.

A. Stumps, boulders, logs, timbers, pieces of concrete, household goods.

Q. Pieces of concrete? A. Yes, sir.

Q. Do you know where they came from?

A. I do not.

Q. Are there a good many stumps in there?

A. There are not a good many stumps in there—there are large pieces of blocks, sand, household goods. (50—39)

Q. How is it down here at what is marked “Original Channel”? A. There is nothing. [43]

Q. Nothing then west of the flume?

A. Not much; there is at a certain point here there is some brush.

(Testimony of A. Eikland.)

Q. But there is nothing on the westerly side of the hospital that was filled in by the flood?

A. No, very little there.

Q. Now, Mr. Eikland, you stated that your lot is approximately halfway between Willoughby Avenue and the Gold Creek bridge?

A. Approximately.

Q. What is the difference in the grade, if any, between your house and Willoughby Avenue and your house and the Gold Creek bridge?

A. Well, the grade there might probably be,—oh, Gold Creek is steeper.

Q. Than it is further down?

A. Yes, than it is further down.

Q. Now, when your house went out on this day, was that the first house that went out—do you remember whose house was the first to go out?

A. Yes.

Q. Whose was it? A. N. G. Nelson's.

Q. Do you know a house belonging to a man named Ingman? A. Yes, sir.

Q. Did it go out before yours? A. Yes, sir.

Q. As a matter of fact when that house went out it floated over and hit your house, didn't it?

A. It did.

Q. And it knocked your house over into the water?

A. My house must have been pretty shaky by the time the (51—40) other houses hit it, but it struck it.

Q. When it struck it what happened?

(Testimony of A. Eikland.)

A. It leaned over for awhile, and after while it shot over on the other side, and my house went out also.

Q. They both went at the same time?

A. Yes, sir.

Q. How was the stream at that time? Was it sluggish and slow? [44]

A. No, sir, very strong current at that time.

Q. Do you know where Ingman's house is now?

A. He moved it.

Q. It did not collapse, did it?

A. Not completely; he repaired it and is living in it now. (52-41)

Q. You say they strengthened the flume?

A. They did.

Q. In what direction—where was that?

A. They strengthened it from the 9th Street bridge up, on what I call the lower side.

Q. On the side next to your house?

A. No, sir; on the opposite side.

Q. Who did that?

A. Casey superintended the work.

Q. Do you know who built that flume originally?

A. The man that built it? (55-44)

Q. Yes.

A. I wasn't personally acquainted with him; I called him Ole—that's all I did know, but I heard his name was Opsahl.

Q. Opsahl?

A. Ole was the only name I knew him by.

Q. Do you know how he built it?

(Testimony of A. Eikland.)

A. I saw him construct it.

Q. No, I mean under what conditions?

A. I do not.

Q. Who owned the property on which the flume was built, do you know that? A. I don't know.

Q. Who owns the bulk of the property out there, Mr. Eikland? A. I don't know.

Q. Well, there is a good deal of property out there that is not built on, isn't there? A. Yes.

Q. You don't know who owns that?

A. I do not. [45]

Q. Do you know whether Mr. Casey owns a house down there or not? A. Yes, sir.

Q. Do you know where that house is?

A. Yes, sir.

Q. Can you point out on this plat about where it is?

A. About where it is? I don't know the lot number—it would be over in this block, facing here—some place here, probably.

Q. Do you know whether it is one of those lots there? A. It must be one of those lots there.

Q. Block what? A. 214.

Q. Do you know where his son owns a house there? A. I do. (56—45)

Q. Casey, Jr.

A. It must be in this block, 208.

Q. Do you know whether Mr. Shattuck owned any property out there, either Mr. Allen Shattuck or Mr. Henry Shattuck? A. I do not.

Q. You think in the flood of 1913—October, 1913

(Testimony of A. Eikland.)

—there was more water in the creek than there was in September, 1918? A. I think there was.

Q. And it was very much the same kind of a flood? A. Yes.

Q. Did you observe pretty well the conditions and the results of that flood? A. I did.

Q. In October, 1913, was there any damage done anywhere by that flood?

A. I don't know whether there was or not. As I stated, there was no houses there—I don't know, there may have been pieces of ground washed out in places—I didn't notice any—there was no damage that I know of.

Q. Do you know what the rainfall was at that time? A. I do not. [46]

Q. Do you know what the rainfall was in September, 1918? A. No, sir.

Q. Do you know of any other damage that was done in any other direction in Juneau and vicinity in October, 1913?

A. No; there were slides, I know, in different places.

Q. You know pretty well what damage was done in 1918, the time you lost your house?

A. I don't—slides the same as—

Q. You observed the conditions, didn't you?

A. Damage out in the flats I know.

Q. And there was damage in other places too?

A. No, I don't know that.

Q. Do you know whether the Gold Creek bridge remained intact. (57—46) A. It floated out.

(Testimony of A. Eikland.)

Q. Did it float out in 1813? A. It did.

Q. And it floated out in 1918? A. Yes, sir.

Q. Where did it go in 1913?

A. A large part of it lodged directly west of my property.

Q. Did you notice any concrete that came down in 1913? A. No, I did not.

Q. In 1918, Mr. Eikland, as a matter of fact, wasn't there a big flume that broke and came down Gold Creek from way up in the basin?

A. I don't know.

Q. Wasn't there a great deal of damage done on the basin road in 1918?

A. Yes, there was a number of slides.

Q. As a matter of fact wasn't the road almost destroyed?

A. I don't know—I haven't been up—there was slides there, but I don't know that amount of the damage.

Q. You have been in town since then?

A. I have.

Q. Did you observe the damage done over on what is known as Swede Hill? A. I did. [47]

Q. What happened over there?

A. There was a slide and several houses was removed from their foundations by the slide.

Q. Several destroyed? A. Yes.

Q. Any waterfalls come down there that you know of? A. I don't know. (58—47)

Q. You don't know anything about that?

A. I don't know anything about that.

(Testimony of A. Eikland.)

Q. Do you know of any slides on the Salmon Creek road?

A. I don't know anything about that.

Mr. COBB.—I think I shall object to that. It is not proper cross-examination—it is going into their case.

Mr. FAULKNER.—It is cross-examination on whether the flood of 1913 was as great as the one in 1918.

The COURT.—The objection is overruled.

Q. Do you know of any damage done on the Salmon Creek road in 1913?

A. I do not; I was a stranger in the country at that time, and I didn't pay much attention to those things. There may have been lots of damage done but I didn't pay much attention to it.

Q. Did you observe any in 1918? A. I did.

Q. Did you observe any on the road between Juneau and Thane? A. I did not.

Q. Did you observe any damage as a result of the flood on the hill know as Chicken Ridge in Juneau in 1913? A. I did not.

Q. Did you observe any in 1918? A. I did not.

Q. You don't know whether there were any slides up there or not? A. I do not.

Q. But you did observe the slides and the damage that was done on what is known as Swede Hill in 1918?

A. I saw the wreckage the next day—it wasn't the next day— [48] it was several days after.

Q. You didn't observe any damage done there in

(Testimony of A. Eikland.)

1913? A. I did not.

Mr. FAULKNER.—That is all. (59—48)

Redirect Examination.

(By Mr. COBB.)

Q. Mr. Eikland, as a matter of fact, you have heard of slides frequently on what they call Swede Hill, haven't you, every year?

Mr. FAULKNER.—I object to what he heard of.

The COURT.—I think I will overrule the objection. It is all on the question of a comparison of the two floods—still, I don't know about the question of whether he heard—

Q. You know of your own knowledge that in town there have been slides on Swede Hill every year since you have been here?

A. I have heard from conversations about slides all over this country.

Q. It is common knowledge that slides occur on that hill? A. Yes, sir.

Q. Ever after slight rains. Now, Mr. Eikland, was there as much building on Swede Hill in 1913 as there was in 1918? A. No, not so much.

Q. Nothing like as much property down in the flats built up as there has since been built up either?

A. There was not.

Q. Now, Mr. Faulkner asked you about the two houses that went out before yours, Mr. Nelson's and Mr. Ingman's?

A. He didn't ask about two houses—he asked about one.

Q. Where did those houses come from that he

(Testimony of A. Eikland.)

asked you about?

A. I can point it out on the map.

Q. All right, point it out on the map.

A. One was the house built by George Gilbert and sold to N. G. Nelson, on lot 10, block 215; and the smaller house built by [49] N. G. Nelson was erected on the triangle next to his other house—the part of the lot next up against the flume.

Q. Was it one of those houses that struck yours?

A. No, sir. (60—49)

Q. Where did the house that struck yours come from? A. It was on this lot.

Q. What lot is that? A. Lot 3, block 209.

Q. That was carried down and struck your house?

A. Yes.

Q. Counsel asked you about your house, the dimensions and so on—what was the foundation of it?

A. Concrete.

Q. A concrete foundation?

A. Yes, sir; concrete floor.

Q. What sort of floors did it have in it?

A. Concrete.

Q. Above the concrete—the room floors.

A. It had a shiplap floor first, a sub-floor, and oak floors in part of the house and fir in the balance.

Q. Oak floors in how many rooms?

A. Just the one large front room had an oak floor in it.

Q. The rest of it was fir? A. Yes, sir.

Q. Now, counsel asked you about the concrete which you saw in the flume—pieces of broken con-

(Testimony of A. Eikland.)

crete. When your house was undermined did this concrete foundation fall in and give way, of your house?

A. I think a part of the concrete wall was broken in; after the dirt washed out it didn't have much support; a great pile of the dirt in the rear was washed away, and the concrete didn't have the strength to hold against the timbers that came down ramming it.

Q. And these pieces of concrete that you saw in the flume—you don't know whether they came from that or some other foundation? A. I do not.

Mr. COBB.—That is all. (61—50)

Recross-examination.

(By Mr. FAULKNER.) [50]

Q. Do you know, Mr. Eikland, that there was a concrete flume, or a flume with concrete sides up in the Gold Creek basin? A. Yes, sir; I do.

Q. You know it was there before the flood. Do you know whether it was there after the flood?

A. I do not.

Mr. FAULKNER.—That is all.

(Witness excused.) (62—51)

Third. Testimony of E. R. SMITH, taken on former trial, March 24th, 1919, as follows:

Testimony of E. R. Smith, for Plaintiffs.

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. E. R. Smith.

(Testimony of E. R. Smith.)

Q. Where do you live, Mr. Smith?

A. 9th Street.

Q. In what town? A. In Juneau.

Q. How long have you lived in Juneau?

A. Three years approximately—almost three years, lacking a few days.

Q. How long have you lived in Alaska?

A. Three years—the same length of time.

Q. Were you in Juneau during the month of September, 1918? A. Yes, sir.

Q. What business were you engaged in?

A. Lineman for the telephone company.

Q. In that business your duties require you to look out after the lines of the company, do they?

A. Yes, sir.

Q. Do you remember the freshet on September 26th? A. Yes, sir.

Q. Were you down on the flats through which Gold Creek flows that day? A. Yes, sir.

Q. About what time did you go out, Mr. Smith?

A. About a quarter past eight, the first time.

Q. What was your purpose in going out there?

A. Had some telephone lines in trouble.

Q. When you went down there where did you first go to? (77—66) [51]

A. Right by the native hospital.

Q. Is that near the south end of the flume that was constructed to carry that creek?

A. Yes; it was between Willoughby Avenue and the hospital—pretty close to it.

(Testimony of E. R. Smith.)

Q. What was the condition of the water at that time?

A. Why, it was running over the flume enough to knock the poles down, and that is how I happened to be there. The water was going over the top of the flume enough that it washed out a couple of poles and the lines fell down—that is how I happened to go down there at that time.

Q. Where did you notice it was coming from?

A. It was coming through all along there—it was almost as deep on one side as it was on the other.

Q. That was about 8 o'clock in the morning?

A. Shortly after eight.

Q. Just point out to the jury where you were.

A. Right along in here some place—just this side of Willoughby Avenue, back of those houses.

Q. At that time was there any indication of the lower end of the flume choking up that you could see?

A. Running very smoothly at that time except it was so full it was running over a little bit.

Q. Handling the bulk of the water?

A. Yes, sir.

Q. Now, later in the day—do you know where Mr. Eikland's property was—his house that stood there? A. Yes, sir.

Q. Were you up about that part of the ground during the day? A. Yes, sir.

Q. About what time, Mr. Eikland, did you go up there?

A. About half-past ten, I believe, in the morning,

(Testimony of E. R. Smith.)

that I was there—something about that time—I don't remember exactly (78—67) between ten o'clock and noon, anyway. [52]

Q. What was the condition of the water then?

A. Getting a little higher all the time.

Q. At that time was there any indication of danger to Mr. Eikland's house that you could see?

A. Well, it looked kind of doubtful about that time.

Q. Just go ahead, Mr. Smith, and tell the jury,—how long were you there, first?

A. I was there all the rest of the day, practically all day.

Q. I want you to tell the jury in your own way what you saw in reference to the waters, and what they did.

A. Well, it was about half-past eight or nine o'clock, and I reported here at the court,—I was on the jury at that time, and as soon as we were excused, which was 10 o'clock or shortly after, I went back down again, and at that time I believe the bridge was just about out.

Q. Which bridge?

A. The 9th Street bridge, and the two houses.

Q. That 9th Street bridge was the bridge over the flume?

A. Yes, the bridge over the flume, and that was out; and I don't remember right now whether it was one or two of those little yellow houses of Nelson's right next that was gone out or not; and at that time I went up around by Gold Creek bridge

(Testimony of E. R. Smith.)

the upper bridge to the other side of the creek, and the water was coming through there and injuring some of the poles; and from that I came back around, and I don't know just exactly what time it was—probably noon—somewhere along in there, or a little after—and at that time it looked like Mr. Eikland's house was about to go, so we had several wires and cables going across there, and in case his house would go it would catch on them and perhaps tear the whole line out, so I was trying to get those in the clear—

Q. Up on the poles? (79—68)

A. Up on the poles, yes, sir, trying to get those in the clear [53] so in case his house should go it would not tear out the whole line, and from there I got a pretty good grand-stand view of the whole thing.

Q. Did you notice the embankment on the east side of the creek above Mr. Eikland's house about that time?

A. I don't know that I paid particular attention to the bank except the water was running over.

Q. This bank that was constructed there?

A. The flume.

Q. The east side of the flume?

A. The flume was about full at that time, running over, and I think that is about the time it broke up there, clogged up and caused the water to run over.

Q. It did break up there somewhere on the east side? A. Why, yes, choked up.

(Testimony of E. R. Smith.)

Q. When it broke, what did you observe, if anything, in reference to the current, the main body of water, then being diverted and coming over towards Mr. Eikland's property?

A. Well, it just jack-knifed up, closed up and formed sort of an eddy in there, and that started to eat in the bank and kept gradually getting worse as more water came down.

Q. What was it choked it up in the first place,—the main flume, you mean? A. Yes.

Q. Do you know what choked it up?

A. Dirt, piling, boulders, stumps, and the flume choked itself up.

Q. Was that done by the logs out of the flume?

A. Yes, I believe they were in there.

Q. Were you there at the time Mr. Eikland's house went out? A. Yes, sir.

Q. I will ask you if at any time during the high waters there the water ever got as high as the level of his lot?

A. No, I don't think it got as high as the level of his lot. (80—69) [54]

Q. It just ate out the bank?

A. It just ate out the bank—it just kept chewing off the bank—kept caving off all the time.

Q. Do you know where the main channel of the creek was as it originally stood?

A. Yes, I know about where it was—I have been through there.

Q. Is there an embankment across that on the far side of the road? A. Yes, sir.

(Testimony of E. R. Smith.)

Q. Acts as a dam, does it, to prevent the water from going down the main channel?

A. Constructed to carry the water out the main flume.

Q. Did that part of the embankment hold?

A. Yes, that held.

Q. I will ask you what prevented the waters from escaping down the old channel, the original channel of the creek instead of coming over towards Mr. Eikland's property?

A. The flume evidently was the only thing there that could stop it from going on.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Smith, you came over to Mr. Eikland's house about what time?

A. Oh, I don't know just exactly the time—I think about ten o'clock.

Q. Was that before you came to the courthouse or after you left?

A. I was there both before and after.

Q. What time did you come to the courthouse?

A. I don't remember; I expect I reported at 10 o'clock; I was on the regular panel of the petit jury at that time.

Q. And when you first went out to Gold Creek the water was running in the flume smoothly?
[55]

A. Yes,—you have reference to the first time I

(Testimony of E. R. Smith.)

went down there in the morning shortly after 8 o'clock?

Q. Yes. (81—70)

A. Yes, it was running smooth except it was running over and leaking out.

Q. The flume was full?

A. I couldn't say whether it was full or within a foot or two feet of the top—it was high enough to notice, all right—taken out a couple of our poles.

Q. Did you notice when the flume broke up about Mr. Eikland's house?

A. I couldn't say just exactly what time it did break—there was so much excitement I couldn't tell much about it.

Q. There was a good deal of water there, wasn't there? A. Yes, there was a good deal of water.

Q. And it was pretty hard to see what did break first.

A. You might say it was—I didn't keep track of just exactly how it broke.

Q. There were a good many logs and stumps coming down?

A. Yes, debris coming down there.

Q. Came from different directions?

A. Yes, sir.

Q. *Do* it is pretty hard to tell just what did happen at that time?

A. Well, it was pretty hard to tell what happened any more than you could take a look and see just how it choked up and started eating around in there.

(Testimony of E. R. Smith.)

Q. You couldn't tell just what was the cause of it? A. No, the water was too deep.

Q. Now, Mr. Smith, you came here in 1916?

A. Yes, 1916.

Q. And the flume was built then, wasn't it?

A. Yes, sir.

Mr. FAULKNER.—That is all.

(Witness excused.) (82—71) [56]

Fourth. The testimony of C. W. STEARNS taken on former trial, as follows:

Testimony of C. W. Stearns, for Plaintiffs.

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. C. W. Stearns.

Q. Where do you live, Mr. Stearns?

A. At the foot of 9th Street.

Q. In Juneau? A. In Juneau, yes, sir.

Q. Foot of 9th Street, in the Casey-Shattuck addition? A. No, on the tide flats.

Q. Out on the Casey-Shattuck addition?

A. Yes.

Q. How long have you resided in Juneau?

A. Approximately three years.

Q. Was that your first home in Alaska?

A. No.

Q. Where did you live before that?

A. Previous to living there I lived at Ketchikan, Douglas and Thane.

Q. How long have you lived in Alaska alto-

(Testimony of C. W. Stearns.)

gether? A. About 9 years.

Q. Were you in Juneau on the 26th day of last September? A. I was.

Q. Where were you living at that time—the same place? A. At the same place.

Q. Do you remember the freshet that occurred at that time? A. I do.

Q. Do you know where Mr. Eikland's property is? A. I do.

Q. Were you up there that day.

A. I was. (83—72)

Q. Whereabouts were you, as near as you can recall?

A. Well, I was at Mr. Eikland's house—in fact, I helped to move a kitchen range out of the kitchen.

Q. About what time of the day did you first go there?

A. Why, approximately about 9:30, I would judge.

Q. What was the condition of the water at that time—the creek? [57]

A. Why, at that time the creek had broken out of its boundaries on the right-hand side looking up the stream.

Q. That is on the easterly side?

A. Yes; somewhere about, I should judge, 200 feet above Mr. Eikland's property.

Q. How was it behaving? Just describe it to the jury as you saw it, Mr. Stearns, as well as you can.

A. Well, as I observed it at that time the debris

(Testimony of C. W. Stearns.)

had formed a dam at the 9th Street bridge which caused an eddy, causing the water to swing over to that side, and above there the water had broken over or washed out a portion of the riprap or cribbing that had been used as a part of that flume and it was rapidly eating away into that bank back of Mr. Eikland's property. Mr. Eikland's property at that time was not in danger, as near as I can remember—I would not state definitely in regard to that point, of course, but to the best of my knowledge I would not think the property was in danger at that time, although it was eating in along that bank there. I left there shortly after that and went back down on Willoughby Avenue, and later returned—I should judge about 11 o'clock, or between 11 and 12, and helped to move some of Mr. Eikland's belongings from the house, which we piled in the street. But by this time the water had undercut the house on the northwest corner, to the extent that they deemed the house was unsafe for us to remain in there, as I should judge one-third of the house was completely undermined, and the sagging of that corner, you know, naturally made the rest of the house weak, and the floors were springing, and the timbers were (84—73) rather inclined to move up and down as you walked about in the house, so we deemed it was unsafe to stay in there any longer, although there was small articles of furniture and bric-a-brac that was brought out after that.

Q. About what time did the house go, as near

(Testimony of C. W. Stearns.)

as you can recall? [58]

A. Why, I should judge, as near as I can remember, between one and two o'clock.

Q. Now, you are familiar with those flats, are you—been over them lots of times? A. Quite.

Q. Now, from Mr. Eikland's house towards the southwest, towards the channel, is there a considerable slope to the ground, or not—considerable grade to it towards the channel?

A. Yes; that is, off of his lot; there was no grade to amount to anything on his lot. His lot was filled up level.

Q. Did the waters at any time ever come as high as the surface of his lot?

A. Not that I know of. At the time I was in there I would judge that the water was at least—the last time I was in the house, as I mentioned, when the house was unsafe, it was fully 3 feet, I should judge from the top of the ground down to the water level.

Q. It was just cutting into the bank down below?

A. Yes.

Q. Carrying it away. What, if anything, prevented the escape of those waters towards the southwest—towards the channel?

A. Well, it was the cribbing and riprap along on the west side of the flume, undoubtedly.

Q. What did that dam up, if anything?

A. Well, it caught a great deal of debris, roots, logs, that had floated out above there where the break was made.

(Testimony of C. W. Stearns.)

Q. Were there any original creek channels leading out down there through which the water could have escaped towards the southwest? (85—74)

A. Yes, there was the channel that the water was diverted from on building this flume.

Q. And the flood could not escape down there?

A. No, sir.

Q. Had you ever been on Mr. Eikland's property or noticed it [59] before this?

A. Yes, I had.

Q. Just describe to the jury what was the character of the ground—what indication of growth or permanency this ground showed—were there any stumps on it? A. Not that I noticed at the time.

Q. You did not see it in its original condition?

A. No.

Q. When did you first see it?

A. I didn't see it until 1916—the winter or spring of 1916.

Q. You don't know what the condition was when he bought it, then?

A. No, I couldn't say what the original condition of the lot was; I only saw it after it was improved.

Q. This was one of the highest lots, as far as the surface of the ground is concerned, in the flat—much higher than a good many of the other lots that are improved below that?

A. Yes, it is higher than a good many of the lots that have been improved below that.

Mr. COBB.—You may cross-examine. (86—75)

(Testimony of C. W. Stearns.)

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Stearns, you went down to Mr. Eikland's house at what time that morning, about 9 o'clock?

A. About 9 or 9:30.

Q. How long did you stay there?

A. Why, approximately, I should judge, half an hour or such a matter.

Q. And then you returned down to Willoughby Avenue? A. Yes.

Q. What portion of Willoughby Avenue?

A. Why, at the point of outlet of this flume, or approximately so—on the avenue just above the outlet of the flume.

Q. Near the hospital? A. Yes.

Q. And you remained there how long? [60]

A. Well, I presume until somewhere near 11 o'clock.

Q. Then where did you go?

A. Went back up to Mr. Eikland's place.

Q. And remained there until the house went?

A. Yes, I was in that vicinity; I was on the street there—I wasn't in Mr. Eikland's premises all the time I was there. I was in the house and assisted what I could in removing this furniture—I was around there, I should judge, for an hour or so.

Q. Did you see the flume break?

A. No, I did not. I will amend my answer however, to the fact that I did see logs float up there,—as to any specific break—

Q. (Interrupting.) Float up where?

(Testimony of C. W. Stearns.)

A. At or near the point as I mentioned a few minutes ago, about 200 feet back of Mr. Eikland's property—I saw some of the riprap come loose. (87—76)

Q. Where would that be? Will you come down and indicate on this map?

A. I would judge that it was in about this point—there somewhere.

Q. Where did those go?

A. Well, I saw, I think it was two of them—I might possibly have saw more—I remember distinctly seeing two of them—one of them came up and crossed there and remained there for some time—I know it remained there; and one of them came up and swung up, the end around there, and finally swung around here, and went up against the bridge crossing 9th Street.

Q. What time was that?

A. That was between 11 and 12 o'clock.

Q. That wasn't very near Mr. Eikland's property was it? Do you know where Mr. Eikland's property was, on this lot 6?

A. It was right in here—right back of Mr. Eikland's property. [61]

Q. And they remained in the flume?

A. One of them remained in the flume there for some time across the current, which was following the flume.

Q. Where was the other one?

A. The other one went down against the bridge that is across 9th Street—caught on the bridge

(Testimony of C. W. Stearns.)

across there.

Q. The flume at that time was not broken though? A. Yes, the flume had broken.

Q. Where?

A. I couldn't say as to how many places were broken in the flume at that time, from the fact that the only indication I had of the flume being broken was the timber coming out of there—it was impossible for me to see through the water and see what the effect was there.

Q. You didn't see it break? In other words, it was impossible for you to see where the break really occurred?

A. No—it was impossible for me to see exactly where the break occurred.

Q. Yes, there was so much water. (88—77)

A. The volume of water; there was more or less timber and debris, and it was impossible to tell exactly where a leak came from any more than that you could see it when it came up to the surface.

Q. You could not tell very much where it came from?

A. You could tell approximately within a few feet of where it came from because you could see where it came loose.

Q. Could you tell that because you saw it come to the surface? A. Yes.

Q. Was the water smooth, or running swiftly?

A. It was running very swiftly.

Q. Sometimes logs submerge, don't they, when a creek is running swiftly?

(Testimony of C. W. Stearns.)

A. I wouldn't say those logs would submerge so that you couldn't [62] see some portion of them—in fact, I would say that they did not.

Q. You just saw two logs?

A. I wouldn't say whether I saw two or more—I know I saw two.

Q. At that time? A. Yes.

Q. You couldn't see whether they came from the right bank of the flume or the left bank of the flume or some other place?

A. I am reasonably sure of it from the fact that I could see the outlet of the flume from the volume of water and the direction the volume of water was traveling. The flume above there wasn't broken to any extent, but it was impossible for you to follow the line of the flume.

Q. You say there was a good deal of debris and other articles coming down there. Just describe what that was, will you, Mr. Stearns—what it consisted of? A. Consisted of stumps.

Q. Any rocks?

A. Rocks, and I noticed considerable scrap lumber.

Q. Do you know where it came from? (89—78)

A. Why, I will have to presume that some of that smaller stuff came from the Basin.

Q. Where did the big stuff come from, do you think—the stumps and the logs?

A. Maybe from the basin.

Q. Were there any rocks coming down there?

A. No, I wasn't in a position to see any rocks at

(Testimony of C. W. Stearns.)
that point.

Q. Couldn't hear any?

A. I could hear rocks working along, yes—you could hear the rocks and gravel working all the time.

Q. Did you see any portion of a bridge that came down at any time? A. No.

Q. Didn't see any? A. No.

Mr. FAULKNER.—That is all. [63]

Redirect Examination.

(By Mr. COBB.)

Q. Counsel asked you if you see where it broke. I will ask you if you tell from the deflection of the current towards the east side there, if you could locate about where the break was from that?

A. Approximately, yes.

Q. After it broke was there any change in the direction of the current?

A. Yes, there was; there was, whenever a log or any of that material formed a breakwater there it was a sort of wing dam, so that it threwed the water to the east side of the flume, of course.

Q. And that was the current that undercut and destroyed Mr. Eikland's house?

A. I presume it was, yes.

Mr. COBB.—That is all. (90—79)

Recross-examination.

(By Mr. FAULKNER.)

Q. Was all the water, Mr. Stearns, deflected to

(Testimony of C. W. Stearns.)

the easterly side of that flume, or did some of it go on the other side?

A. There was some of it went on the other side also.

Q. How much of it went on the other side compared to what went on the easterly side?

A. The greater volume of water was on the easterly side at that time.

Q. But there was considerable on the westerly side?

A. Yes, there was considerable water over there.

Q. How far up that creek did you go, going up towards the source, that morning?

A. I went to the Gold Creek bridge early in the morning.

Q. Did you see any logs or stumps up there coming down the creek?

A. I didn't see any logs at that time. I see debris of various [64] kinds there, some square timbers that possibly come from some of the flumes up in the basin.

Q. Did you observe at that time any portion of the bulkhead up from Gold Creek bridge, this same bulkhead that is marked on the map?

A. Yes, I looked at some of it—especially where the Power Company's pipe-line crosses the creek there.

Q. Was that all there at that time?

A. That at that time was intact.

Q. Any water going over it? A. No.

Q. Any water behind it? A. No.

(Testimony of C. W. Stearns.)

Q. That was behind the bulkhead there, outside of the creek? A. At the Gold Creek bridge?

Q. Yes, just where it comes out of Gold Creek bridge, going towards the sea?

A. Behind the bulkhead there, there was nothing but the fill that (91—80) had been put in there originally.

Q. What kind of a fill was that?

A. Why, it is composed of debris that was excavated around the stumps, and material of that kind.

Q. As a matter of fact, it wasn't solid ground, was it? A. No.

Q. It was filled in? A. Yes.

Q. No trees or stumps or anything of that kind growing on it—no soil on it?

A. Well, I wouldn't say as to the soil.

Q. You didn't observe that?

A. I wasn't observing the soil on that particular occasion.

Q. As a matter of fact, it was all pretty well covered with water, wasn't it?

A. Yes, there was some water up on it, as I remember it. I was just simply looking at the conditions of the riprap and the possible damage that might be done to the Power Company's [65] pipe-line across there.

Q. You didn't observe very closely so you don't really know much whether it was a fill or whether it was natural ground over that point, do you, Mr. Stearns?

(Testimony of C. W. Stearns.)

A. I know from the fact that I had observed it before.

Q. And it was filled at that time was it?

A. I think so.

Mr. FAULKNER.—That is all.

Redirect Examination.

(By Mr. COBB.)

Q. Where is this ground you are talking about?

A. Why, underneath,—along there, following the creek, below the Power Company's pipe-line—just below where the Gold Creek bridge was.

Q. Which side of the creek—east or west side?
(92—81)

A. I don't understand the question.

Q. I say on which side of Gold Creek, towards town or on the other side, away from town?

A. I observed both sides of the creek there.

Q. Who put that in, do you know?

A. No, I don't know anything about it.

Q. Was that the upper end of the same flume that passes Mr. Eikland's place and runs on out to tide water? A. I couldn't say.

Q. You don't know whether it is built continuous through there or not? A. No.

Q. You don't know whether that is a part of the improvements that the defendants attempted on Gold Creek in 1914 and '15? A. No, I do not.

Q. When is the first time you observed that?

A. I couldn't say.

Mr. COBB.—That is all.

(Witness excused.) (93—81½) [66]

Fifth. The testimony of LLOYD M. RITTER, as taken on former trial, as follows:

Testimony of Lloyd M. Ritter, for Plaintiffs.

Direct Examination.

(By Mr. COBB.)

Q. State your name, Mr. Ritter.

A. Lloyd M. Ritter.

Q. Where do you live?

A. I live on 9th Street.

Q. In the city of Juneau? A. Yes, sir.

Q. How long have you lived in Juneau?

A. Oh, possibly 15 years altogether.

Q. How long have you lived in this place, on 9th Street? A. About eight years.

Q. What has been your occupation since you have been in Juneau?

A. The last six or seven years I have been in the transfer business.

Q. Prior to that time?

A. Prior to that time I was in the bakery business.

Q. Now, Mr. Ritter, which way is your house on 9th Street, where you live, from Mr. Eikland's property which was destroyed?

A. It is in an easterly direction.

Q. About how far?

A. I should judge about a block—maybe a little more.

Q. Something like 200 feet?

A. 200 feet, maybe—300 feet at the outside.

(Testimony of Lloyd M. Ritter.)

Q. Were you in Juneau on the 26th day of last September? A. Yes, sir.

Q. Do you remember the freshet in Gold Creek on that day? A. Yes, sir.

Q. Where were you on that day?

A. Well, early in the morning I was at home. I left home in the (94—82) neighborhood of 5 o'clock and I didn't get back home until, oh, perhaps 7:30 in the evening. The rest of the day, all the time I was gone from home—I was on the Femmer and Ritter dock. [67]

Q. Did you notice the high waters there around his place that day?

A. Well, I noticed the destruction that was done during the day that night when I got home.

Q. Were you there during the day?

A. No, sir.

Q. Had you ever been on this property before this flood? A. I have been all over those flats.

Q. Just describe to the jury this lot in reference to its elevation above the general level of the ground to the west from it.

A. Well, it was higher than the ground to the southwest.

Q. How much would you say about?

A. That would be pretty hard for me to say.

Q. Considerable slope over towards the southwest?

A. There is a considerable fall to the creek there; the water generally runs along at a pretty good pace—that is the only thing I have to go by is the

(Testimony of Lloyd M. Ritter.)

swiftness of the water.

Q. Did you ever notice the surface of his ground?

A. Yes.

Q. Any indication of growth on it?

A. Yes, there was.

Q. What was it?

A. Well, there were a number of stumps on it at one time—I don't know how many, but several of them, I should say.

Q. Just describe or give the jury the best idea you can about it, as to any of those stumps—the size of them, and what size trees would produce them.

A. Well, I hauled the lumber for Mr. Eikland's house, or a good part of it anyway, and there was enough stumps on that ground (95—83) so it made it hard work to get and around by a team; and there were some of them, I suppose, that were,—oh, they would run from 2 to 4 feet in diameter.

Q. Was the ground all marshy, boggy, or was it solid?

A. No, it was good solid ground—solid enough to carry a [68] team of horses and a wagon.

Q. Now, on this morning of the 26th, you were there, did you notice the freshet in Gold Creek alongside of Mr. Eikland's property that morning before you left?

A. No, I didn't; it was too early in the morning for me to pay any attention to anything of the kind. I knew the water was up, but as to noticing it, I didn't.

(Testimony of Lloyd M. Ritter.)

Q. Did you see the flume afterwards—later, after the waters went down?

A. I see it that night when I went home, what there was to be seen from my residence.

Q. What did you see then?

A. Well, Mr. Eikland's house was gone, and a couple of—I don't know just how many—some two or three more houses were gone. One man's house, it seemed to be sitting right in the middle of what formerly had been 9th Street—sitting out in the creek—it had been washed out there.

Q. Just step down here to this plat, Mr. Ritter, a moment. Mr. Eikland's property on this plat is right here, lot 6, block 209. Your house is about at that point on 9th Street, isn't it?

A. Yes, I think that would be my lot right there. It is a triangular shaped piece—that is the piece of ground right in there—just a triangular piece of ground—it is possibly 25 feet wider at one end than it is at the other.

Q. Now, how far towards this cribbed flume before these flood waters came did the high ground extend? A. I don't understand the question.

Q. You testified, as I understand, that this was high ground in here—solid ground, covered with stumps? (96—84) A. Yes, sir.

Q. Mr. Eikland's property—how far towards the southeast did the high ground extend on that bank?

A. Well, there was two houses between his house and the creek. [69]

(Testimony of Lloyd M. Ritter.)

Q. Were they on ground about as high as Mr. Eikland's?

A. Yes, I think—it might have been some lower, but not a great deal, because it couldn't fall very much in that distance.

Q. How about the level of this ground as to the height compared with the level of the top of the flume? A. I don't recall that.

Q. When you got there that evening—have you at any time since then observed anything that is damming up this cribbed channel?

A. I haven't been down there since the flood—I have had no occasion to go.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. What time *was* you left the house that morning, Mr. Ritter?

A. Well, I should say it was in the neighborhood of 5 or 5:30.

Q. Before daylight?

A. I cannot recall that part of it. It would have been getting around pretty close to daylight at that time.

Q. When did you return, did you say?

A. It must have been 7:30 in the evening.

Mr. FAULKNER.—That is all.

(Witness excused.) (97—85)

Sixth. The testimony of HANS BERG, also taken on the former trial as follows:

Testimony of Hans Berg, for Plaintiffs.

Direct Examination.

(By Mr. COBB.)

Q. State your name? A. Hans Berg.

Q. Where do you live?

A. I live on 11th and B Streets.

Q. In the Casey-Shattuck addition?

A. Yes, sir.

Q. How long have you lived there? [70]

A. I have lived there since the 16th of September.

Q. 16th of September, 1918. A. Yes, 1918.

Q. How long have you lived at Juneau?

A. Well, I have lived in Juneau, with the exception of 4 months, since about the 10th of May, 1913.

Q. You were away three or four months?

A. Yes—that was in December, 1914, to the first of April.

Q. Were you out in the vicinity of your home on the 26th day of September, 1918, the day of the freshet? A. Yes.

Q. Did you observe the high water on that day?

A. Well, quite closely after I got home, yes.

Q. What time did you get home?

A. Well, it was around about half-past twelve or a quarter to one.

Q. Where were you before that?

A. I was down here working on a building next to the Graves Clothing store.

(Testimony of Hans Berg.)

Q. Now, just point out to the jury here on this map, Plaintiff's Exhibit "A," where your home is. You say you live on the corner of 11th and B Streets? A. Yes. (98—86)

Q. That would be at this point here?

A. On this lot here.

Q. Did you have a clear view from there down to where Eikland's house was?

A. Quite clear, yes.

Q. On down the street?

A. On down the street.

Q. Did you see Eikland's house go?

A. Yes, sir.

Q. Where were you at the time?

A. Right in the street here.

Q. Watching? A. Watching.

Q. How long had you been there before the house went?

A. Well, to say to a minute, I couldn't say but about three-quarters of an hour after I came home.

Q. You had been watching for three-quarters of an hour what was being done there? A. Yes.

Q. There had some other houses gone out before that? A. Yes. [71]

Q. Now, I want you to describe to the jury when you first noticed, or went out there to take a look at things, could you tell whether any part of the flume had gone—the flume that carried the creek before that?

A. It looked like when I came home there was

(Testimony of Hans Berg.)

a part of it out—had gone out between A and B Streets over there.

Q. Somewheres in there?

A. Yes, somewheres in there.

Q. What was it indicated to you that it had gone?

A. Well, indicated to me that the water was thrown over more on the east bank there.

Q. There was big current going in that direction? A. Yes. (99—87)

Q. Could not have gone there if the embankment had held, you think?

A. Not very well, in my opinion, you know.

Q. Was there anything to indicate to you, or did you see anything that indicated to you that this artificial channel had been blocked up in any way?

A. Well, it looks like there was something in there, but the water was at that time so high that I couldn't see exactly what it was, but there was something in the channel, that kind of threw the water over to the south bank of that creek.

Q. South or southeast bank. Now, that water that was being thrown over there, what was it doing in reference to the ground of Eikland's lot?

A. Well, so close as I could see from the point I was watching it, it was cutting in—sort of undermining the ground.

Q. Was any part of the lot that wasn't cut out by the water flooded—was the water high enough to cover the lot in its original condition?

A. Well, I don't believe it could, although it was

(Testimony of Hans Berg.)

hard to see from there. [72]

Q. It was hard to see from where you were?

A. Yes sir.

Q. You knew Mr. Eikland's lot—you had seen it lots of times before?

A. Yes, I knew Eikland's lot.

Q. It was a good high lot?

A. Fairly high, yes.

Q. Have you seen that ground down there since the water went down?

A. You mean where Eikland's lot was?

Q. Yes, and the creek-bed along there?

A. Yes.

Q. How long after the flood were you down there?

A. The next day I went to work again, so I didn't pay close attention to it.

Q. Have you seen it since *the*? (100—88)

A. Oh, yes.

Q. Did you see anything in there at the place where this swirl of the waters towards the east bank came that would have caused it?

A. There was some logs and some rubbish in there—roots.

Q. About at the place where this—

A. Well, about there, yes—you couldn't see exactly, because the water was high—you couldn't see exactly where it was.

Q. Have you seen the lower part of the flume since then?

A. Just from walking by Willoughby Avenue, yes.

(Testimony of Hans Berg.)

Q. It is full of rubbish and stuff, *it it*?

A. Yes.

Q. Now you had often seen that artificial channel of Gold Creek, or the flume before this flood, had you not? A. Yes.

Q. Now on these occasions did you ever notice where it crosses the main original channel of Gold Creek,—you know where it crosses the channel?

A. Yes.

Q. Did the embankment on the west side of the creek hold at place, or was it broken out, too?

A. No.

Q. That held, did it?

A. That I understand is there—that was right by 10th Street, where the bulkhead crosses the old channel. [73]

Q. Yes, that held. If that bulkhead had not been there, or if it had given way do you know which way the waters would have gone then, in their natural flow?

A. Well, as far as I could see they would go down the old channel—the old channel that was there when I first came to Juneau; I believe they couldn't have gone any other way, because that was the lowest place.

Mr. COBB.—That is all.

Mr. FAULKNER.—No cross-examination.

(Witness excused.) (101—89)

Seventh. The testimony of PETER COGGINS, also taken on the former trial, as follows:

Testimony of Peter Coggins, for Plaintiffs.

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. Peter Coggins.

Q. Where do you live, Mr. Coggins?

A. On A Street, the foot of Distin Avenue,

Q. In Juneau, Alaska? A. In Juneau, Alaska.

Q. How long have you lived in Juneau, Alaska?

A. Well, I came to Juneau, Alaska, 1896, and I lived here more or less ever since.

Q. This has been your headquarters then, ever since? A. Yes, sir.

Q. What is your occupation?

A. Engineer—stationary engineer.

Q. During the 23 years you have been up here have you noticed weather conditions?

A. I have very often observed the weather conditions.

Q. This is a very rainy coast, isn't it?

A. Yes, it is a rainy coast.

Q. Now, I will ask you whether or not this region of the country around Juneau and South-eastern Alaska is subject to [74] heavy rainfalls at times, and high waters in the streams? (135—121) A. Yes, it is.

Q. Do you remember the high water and freshet that occurred at this place on the 26th of last September? A. I do.

(Testimony of Peter Coggins.)

Q. Where were you on that day?

A. I was at the Alaska Light and Power Company's power-house.

Q. Did you observe the flood during the day?

A. I did.

Q. Now, I will ask you, Mr. Coggins, if you have, in your life in Juneau, Alaska, seen other freshets as high, or practically as high as that one?

A. Well, I couldn't say whether I did or not. I didn't ever pay any attention to freshets. I have seen a great many freshets here but never paid any particular attention as to whether they were as high as that or not—I have seen very heavy rains here.

Q. And very high water in the creeks?

A. Yes.

Q. You wouldn't undertake to draw a comparison, then? A. No, I would not.

Q. Can you give the jury your best estimate on it?

A. Well, I think we have had freshets here that was very near as high as that one. I have seen high water, as I say; never paying particular attention to the height of the water, and at those times—those freshets I couldn't say that they were as high as this, and they might have been higher for all that I know.

Q. About how often do these freshets come as a rule?

A. Well, about every five years, is my observation.

Q. That is, you have never noticed a longer period

(Testimony of Peter Coggins.)

than five years between these very high freshets, you think?

A. No; practically speaking, about 5 years.

Q. Is there or is there not considerable variation in the amount of rainfall from year to year?
(136—122) A. Oh, yes. [75]

Q. That is, as to the amount of rainfall at any one time?

A. There is quite a difference in the rainfall from one year to the other. Some years we don't have near as much rain as the others—some years we have very heavy rains for a short period.

Q. Mr. Coggins, on September 26, 1918, what time did you get down to your place of work at the Electric Light Company's plant?

A. About 8 o'clock in the morning.

Q. You live right near there?

A. I live right there; yes, sir.

Q. What time did you first observe the waters that morning? A. Shortly after 8 o'clock.

Q. What was their condition at that time?

A. Well, the creek was running about full of water at that time when I first noticed it, and spattering over in places—over the bulkhead.

Q. Any indication of danger at that time?

A. Well, yes, I could see there was stumps and timber and such things coming down the creek and catching, because the water was flowing over.

Q. Whereabouts was it catching?

A. Well, catching in the creek; there was timbers across the top.

(Testimony of Peter Coggins.)

Q. Whereabouts along this flume?

A. That was right opposite the power-house—the Alaska Light and Power Company's power-house.

Q. Near the lower end of the flume, a short distance from where it discharges into salt water?

A. Near the lower end, yes.

Q. I will ask you to step down here a minute, Mr. Coggins. Can you point out on this plat—this is a plat of part of the Casey-Shattuck addition. This is 8th Street, and this represents the flume, where it was. This piece of ground, large, [76] irregular shaped piece of ground near the southeasterly corner of the (137—123) plat is the Light Company's property. How far from that flume, about, is it to the Light Company's plant?

A. About, I should judge, not over 300 feet.

Q. You don't know just how far it is?

A. I don't know just how far it is—I never measured it.

Q. The Light Company's plant is very close to the tide line, is it not? A. Yes.

Q. You say it was about opposite that point where the jam came and it was catching?

A. That is where the water first came over.

Q. Did you notice the first blocking—the first formation of a jam in the flume? A. I did.

Q. At what time of day was that?

A. About 8:30.

Q. You say that was somewhere about opposite the Light Company's plant? A. Yes, sir.

Q. How did that jam form?

(Testimony of Peter Coggins.)

A. Well, there was such a large volume of water coming down there that I couldn't see what caught, whether it was stumps or timber—I know there was both stumps and timber coming down the creek.

Q. And it caught and jammed in there—that was plainly evident, was it? A. Yes.

Q. After the first jam formed, I want you to describe to the jury what occurred in the flume after that.

A. When the jam formed over here I believe about all the water in the creek was thrown over towards the power-house, and when I first saw the jam forming there, I saw, or thought I saw, danger for the Light Company, and I phoned to the office to the manager and he came down and looked around and by (138—124) that time the first jam had broke away—kind of [77] cleared itself, so the manager went away, and a short time after he went away another jam formed.

Q. About the same place?

A. About the same place, and then it threw all the water over towards the power-house, and I phoned to him again—that was about 9 o'clock in the morning—the water was all coming through there, and the manager came down there the second time and took steps to protect the Light Company's property there; what he done I don't know because I was very busy myself and I don't know just what he done.

Q. When the second jam formed, did that go out at all? A. No, that didn't go out.

(Testimony of Peter Coggins.)

Q. Do you know how far up the flume the debris and timbers and stumps, sand and rocks collected after this formation of the second jam?

A. No, I don't—I don't know how far up. When I saw that jam didn't go out—that jam moved, then caught, and moved a little farther out, and caught several times, but never cleared, the second jam.

Q. Did it keep filling up, or not, farther up the flume? A. Yes.

Q. That entire flume. Have you noticed it since the flood?

A. I didn't go up along there—I haven't went any farther up than the power-house.

Q. You could tell it was filling up a considerable ways farther up, that day, after this jam formed?

A. Yes, sir.

Q. Do you know where Mr. Eikland's property is? A. Yes, sir.

Q. Did you go up there that day? A. Yes, sir.

Q. What time of day was it?

A. Some time after dinner—in the afternoon—I don't know what (139—125) time—might be 2 o'clock.

Q. At the time you got there had Mr. Eikland's property been [78] destroyed?

A. Yes, Eikland's house was gone when I went up there.

Q. And which way was the main current of the stream then with reference to where the flume had been? A. It was coming this way.

Q. Towards the east or northeast side of the

(Testimony of Peter Coggins.)

flume? A. Yes.

Q. Could you tell what was making it do that?

A. No, I couldn't say what made it do that. I didn't have time to make any observations there or look around—I was very busy. We was afraid the water was going to come through at any time at the power-house, and I went up there at this particular time to see if there couldn't be something done to stop it.

Q. A great deal of water—the bulk of the water was coming over the east side of where the flume had been? A. Yes, sir.

Q. Across to where Mr. Eikland's house and lot had been? A. Yes, sir.

Q. Was there any great amount of it going down the old channel—do you know where that is?

A. Yes; there wasn't very much going down the old channel. There was kind of a ridge formed in the creek—that is, speaking of the creek where it run that morning, and it spread the water different ways.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Coggins, when you first went out there did you notice any water flowing any other place except in the flume? A. No, sir. (140—126)

Q. Nowhere else? A. No, sir. [79]

Q. And the flume was full at that time, was it?

A. Yes, sir.

(Testimony of Peter Coggins.)

Q. And was the water spilling over?

A. The water did not begin to spill over until this timber commenced to come down.

Q. Where was it you saw that timber lodge?

A. About opposite the power-house—probably a little farther down towards the bridge—between the bridge and the power-house.

Q. Which bridge is that, Mr. Coggins?

A. The bridge on Willoughby Avenue.

Q. Between the bridge and the power-house?

A. Yes, sir.

Q. How close to the bridge?

A. Well, it might be 200 feet from the bridge.

Q. Did you observe whether there was anything at the bridge—did you observe the condition of the water at the bridge?

A. Not at that time, no.

Q. Don't know just how high it was?

A. No, sir.

Q. Did you observe it later on?

A. Well, no; the first time that I saw the Willoughby Avenue bridge, why, there was a block—the whole creek was blocked up with timber, stumps, and such as that, so there was no water running under the bridge at all.

Q. Where was the water going at this time?

A. At this time I am speaking of it was going over towards the Native Hospital.

Q. In which direction was that—easterly or westerly—from the flume?

A. That would be westerly.

(Testimony of Peter Coggins.)

Q. The flume for a certain distance crosses the property of the Electric Light Company, don't it? (141—127)

A. I don't know where the line of the Electric Light Company's property is so I don't know whether it crosses it or not?

Q. And you don't know whether this flood was as high, or higher [80] or lower, than other periods of high water, in the last 25 years?

A. No, sir, I don't.

Mr. FAULKNER. That is all.

(Witness excused.) (141½—172½) [81]

Testimony of John Wagner for Plaintiffs.

JOHN WAGNER, called as a witness on behalf of the plaintiffs, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. Please state your name? A. John Wagner.

Q. Where do you live, Mr. Wagner?

A. Live at Salmon Creek.

Q. Which way is Salmon Creek from Juneau—how far?

A. About three; three and three-quarters of a mile.

Q. Speak a little louder.

A. Three and three-quarters of a mile.

Q. Up the Channel? A. Up the Channel.

(Testimony of John Wagner.)

Q. West or northwesterly? A. Northwesterly.

Q. The other side of Gold Creek from Juneau?

A. Yes.

Q. Mr. Wagner, how long have you lived in this portion of Alaska? A. Ever since 1886.

Q. Ever since 1886. Or did you say '96 or '86?

A. '96, I mean to say.

Q. 1896. Now, have you had occasion to observe the weather during that time?

A. I have

Q. What is your occupation? A. Mining.

Q. How long have you engaged in mining?

A. How long? I have been engaged in mining ever since I have been in Aaska, but I was engaged in mining ever since I [82] was eleven years old.

Q. From 1896 on, you have been mining around here, in Alaska?

A. Yes, around Salmon Creek, Gold Creek, Berners Bay—

Q. Now, do you recall the flood of 1918, September 26— A. (Interrupting.) Yes.

Q. (Continuing.) that carried away Mr. Eikland's property? A. Yes, sir.

Q. Where were you that day?

A. I was out—I was out at Salmon Creek that day.

Q. You were out at Salmon Creek?

A. I was out there that day and come in from there to town.

Q. Came in to town? A. Yes.

(Testimony of John Wagner.)

Q. Now, you had good occasion, then, to observe the height of water and the amount of rainfall—

A. Yes, sir.

Q. (Continuing.) So far as the rainfall affected the flood waters? A. Yes.

Q. I will ask you, Mr. Wagner, if during the twenty-odd, twenty-five years or more that you have been up here, had been up here at that time, you had ever observed a rainfall as heavy and water as high in the creeks? A. I have.

Q. As high as it was on that day?

A. Yes; there was two feet and a half higher water the year we built the house—

Q. (Interrupting.) How's that?

A. It was two feet and a half higher when we built the house, the big house out there at Salmon Creek. [83]

Q. Now, when do those rainfalls usually come?

A. In the fall; in September.

Q. Do you remember the flume or cribbed channel, or artificial channel that was put in by Casey and Shattuck? A. Yes, sir.

Q. From the mouth of Gold Creek up the creek?

A. I do.

Q. You observed that while it was being built, or about the time? A. Yes. What is that?

Q. Did you observe it then? A. Yes.

Q. When it was being built? A. I did.

Q. I will ask you if, as a practical miner, you have had any experience in building cribbed channels where you have no other material except logs

(Testimony of John Wagner.)

and so on, bulkheads and so on, to confine the waters of streams? A. I have.

Q. You know how they should be built?

A. Yes.

Q. I will ask you how this channel, this cribbed channel that was put in down there on the flat past Mr. Eikland's property and down to the sea, how that was built; if anything was wrong with it, explain to the jury what was wrong, what made it dangerous.

A. It never was put down to the bottom of the channel; that is, to the bottom of the creek-bed.

Q. How's that?

A. It hadn't been put below the creek-bed. It was put on from [84] boulder to boulder and the boulders, of course, washed out and away it went. When one went, it all went.

Q. Just repeat that a little louder?

A. I said it wasn't put down far enough, not even to the bottom of the creek-bed. It was put down from boulder to boulder, and then when the boulders washed out, why away it went.

Q. That is the foundation logs were not put down sufficiently deep?

A. No; they ought to have been put down below the creek-bed, by rights.

Q. Yes. Now, did you observe what happened to that— A. (Interrupting.) Yes, I did.

Q. (Continuing.) When that flood came in?

A. I did.

Q. What did happen? A. It all went out.

(Testimony of John Wagner.)

Q. Now, I want you to describe to the jury, in your own way, how that, the sides of that artificial channel put in by the defendants, Casey and Shattuck, how it was built?

A. Well, it was timbers; timbers were run from one boulder to the other, and, of course, when those logs and boulders were undermined, they rolled over and the logs went and then the whole thing went out.

Q. How long were the timbers, about?

A. I guess some of them were close to twenty-five, thirty feet long.

Q. You didn't notice the length?

A. No; I didn't measure them.

Q. Pretty long timbers?

A. Yes; pretty long timbers. [85]

Q. Now, in what manner were they put down, generally below or above the level of the creek-bed?

A. Generally above.

Q. Now, tell the jury. Just describe it to the jury so they will understand—some of them may not be familiar with that kind of work—just what is likely to happen to it during a period of high water? A. Well, it would go out.

Q. Now, whenever there is flood waters in streams of this country, high water, as it is called, I will ask you if it isn't the general rule that debris, stumps and logs of every kind— A. Yes.

Q. (Continuing.) Brush, and so forth, are brought down with the high waters?

A. Brush, logs and everything else comes down.

Q. Watersheds here are very steep? A. Yes.

(Testimony of John Wagner.)

Q. Now, I will ask you, Mr. Wagner, if in building a channel, an artificial channel or flumeway to carry the waters of a stream, where you have no penstock to take out the stuff that the stream brings down, is it the proper and workmanlike way to build it to narrow the width of that channel at its lower end or place of discharge into the sea? A. No.

Mr. FAULKNER.—Just a minute. I object to that. The witness is not qualified at all; the witness hasn't been qualified.

Mr. COBB.—I think he has. He says he has had a great deal of experience in building flumes, and so forth, and knows how these things ought to be constructed to handle water. [86] Most any miner is qualified.

The COURT.—I think he may answer.

Q. Yes. You have had a great deal of experience in that kind of work?

A. I have; I have put in abutments for bridges, and iron bridges too.

Q. Now, you can answer the other question? (Following question repeated by reporter:) "Now, I will ask you, Mr. Wagner, if in building a channel, an artificial channel or flumeway to carry the waters of a stream, where you have no penstock to take out the stuff that the stream brings down, is it the proper and workmanlike way to build it, to narrow the width of that channel at its lower end or place of discharge into the sea? A. It ain't.

Q. Just explain why it is ont, and what is likely to happen if it is narrowed like a bottle neck at

(Testimony of John Wagner.)

the lower end?

A. There is where it would block up until the water would go somewhere else.

Q. Block up with what? A. Yes.

Q. Block up with what?

A. With rubbish that comes down the creek.

Q. Do you know whether or not the flume that was put in by the defendants did block up at the time of the flood we're inquiring about? A. Yes.

Q. Did you observe it? A. Yes.

Q. Just tell us what you saw? [87]

A. Well, it filled up with logs of all kinds, timbers and stumps—anything that came down the creek.

Q. Were you in Juneau on the 26th day of September, 1918, the day of that big flood?

A. Why yes; I was out there and I came in.

Q. What time of the day, about, did you come in?

A. I think along about two o'clock; about two o'clock.

Q. Which way did you come after you got here, into town, on the flat?

A. I came up through the graveyard and came over this bridge up here just before it went out. They hollered not to cross, but I made it all right.

Q. The Gold Creek bridge?

A. The Gold Creek bridge; that is, the upper one. They hollered not to cross.

Q. You think that was about two o'clock?

A. Yes; about that. I don't know exactly what time it was.

Q. Now, just tell the jury what you saw on that

(Testimony of John Wagner.)

day in regard to high water on the flats at the time you came in?

A. Well, they were carrying people out of the houses, away from their houses and carrying furniture away; that's all I noticed; I didn't go down there.

Q. You had often observed high water on those flats before?

A. Yes, sir; but not as bad as that

Q. And you have seen it as high as it was that day? A. Sure.

Q. Now, prior to 1913, or 1914, '15 and '16, along there, there were no new buildings, to speak of, out on the flats? A. No.

Mr. FAULKNER.—Just a minute. I object to that as leading. [88]

Mr. COBB.—I think that it is leading. I withdraw it.

Q. Do you know when the flats were first built up, houses put up? A. Why—

Q. You don't recall? A. I don't recall.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Wagner, how long have you been engaged in mining?

A. Ever since I was eleven years old.

Q. And—

A. (Interrupting.) I didn't have to come to Alaska to learn that.

Q. And how long is it since you have quit mining?

A. How?

(Testimony of John Wagner.)

Q. How long is it since you have quit mining?

A. I ain't quit.

Q. Still mining. A. Yes.

Q. Where did you have experience in the building of bulkheads, to carry the banks of streams?

A. I had that back East and I have had it right here.

Q. Whereabouts in the East? A. In Illinois.

Q. Where? A. In Illinois.

Q. For what purpose? A. Galena M.

Q. What is that? A. Galena M. [89]

Q. For what purpose did you build bulkheads there? A. For bridges; iron bridges.

Q. You built iron bridges?

A. I built abutments, put abutments in for a bridge over the Freeport River.

Q. Over what? A. Freeport River.

Q. Put abutments in there? A. Yes.

Q. Now, where did you build bulkheads?

A. In Salmon Creek.

Q. Whereabouts is the bulkhead there?

A. Right at the falls; built there since 1900.

Q. A bulkhead? A. Yes.

Q. When was that? A. Put up in 1900.

Q. How big was it?

A. It was about forty feet long. We had to cut some of it off in order to put that building up there, but the rest of it is there.

Q. Is that a bulkhead or flume?

A. No; it's a flume.

Q. Now, Mr. Wagner, are you familiar with the

(Testimony of John Wagner.)

action of streams in times of high water? A. Yes.

Q. In those flumes and places? A. Yes.

Q. Know about the capacity of streams, how it varies with the amount of water, do you? [90]

A. Yes.

Q. Now, what is the difference between— You know that streams, as they flow down the mountains, have a certain carrying capacity? They carry down stumps, you say, and debris? A. Yes.

Q. Timber and such things at times?

A. Yes.

Q. Now, supposing you have a stream flowing down, like Gold Creek, with a certain volume of water in it, if you increase that volume—double it, say—what would be the difference in the carrying capacity? How much more stumps and debris would it have the capacity to carry?

A. It wouldn't carry any down in the winter-time when there isn't any water, but it would carry it when there is a flood.

Q. I don't think you answered the question. Say you have a thousand cubic feet per second coming down there— A. Yes.

Q. And that that is increased to two thousand feet per second. A. Yes.

Q. What is the difference in the amount of material that will be carried down?

A. Oh, it will carry down quite a bit more, if there is any in the way.

Q. Twice as much? A. Yes.

Q. Well, how much more?

(Testimony of John Wagner.)

A. Well, it is hard to tell. Anything that is in the creek it will carry down, if it is loose.

Q. I know, but there is a limit to its capacity.
[91]

A. Yes, sure.

Q. Well, now, would it carry down—when the volume or the velocity of the stream is twice as great, will it carry down twice as much?

Mr. COBB.—I shall object to that as not proper cross-examination. We didn't ask him about that. This is a practical man and he is asking him a question that the most careful mathematicians might differ about, because it is not exact.

The COURT.—Objection overruled. He is put on here as an expert.

Q. I just want to get your best idea, Mr. Wagner.

A. Sure, when there is more water, it will carry more down.

Q. Well, how much more will it carry if the volume of water is doubled?

A. It is hard to tell. It just depends upon whether there is anything in the road. If there isn't anything in the road, it would carry nothing.

Q. Supposing there is a stream like Gold Creek that we're talking about, and there is a thousand cubic feet per second flowing down there, and you fill it up with logs and debris of all kinds, all that it will carry—

A. Yes.

Q. And then comes along a flood and increases it to two thousand cubic feet of water per second and it is filled up with debris, all that it will carry, how much

(Testimony of John Wagner.)

more will that be? How much more will that carry when the volume of water is doubled?

A. I don't know how much more it will carry down. If there isn't anything in the road, it won't carry nothing down.

Q. No; I mean if there is anything in the road?
[92] A.

Q. Have you any idea how much more?

A. No, I don't.

Q. You haven't any idea? A. No.

Q. Now, Mr. Wagner, in building a bulkhead or flume, to confine the banks of a stream, or to carry the stream, is there any standard of measurement as to the size of that? What do you go by?

A. What would you go by?

Q. Yes; as to the width and capacity of it. What would you measure it by? What would you take into consideration in the building of a bulkhead or flume? A. What would I go by?

Q. Yes.

A. I would try to put it in below the creek-bed so it wouldn't go out.

Q. Now, that isn't the question.

The COURT.—How would you determine the capacity of a bulkhead or artificial channel?

Q. How would you determine the capacity of it? Now, if you were building a flume to carry a stream of water, or if you were building a bulkhead to carry a stream, how would you determine the capacity of it? What would you take into consideration?

(Testimony of John Wagner.)

A. Well, I wouldn't know what, how much water. I would try and build it strong enough so it would stay there.

Q. I know, but what would you take into consideration to get the capacity, to get the size of it?

A. To get the size of it? Q. Yes? [93]

A. Well, I wouldn't try to narrow it down at the lower end.

Q. Well, now, you say this shouldn't be narrowed up at the lower end. Tell us where it should be narrowed. A. If anything I would widen it.

Q. Where would you widen it?

A. Then it would leave the rubbish go down there, go down through it.

Q. How would you determine that? What do you take into consideration when you determine the capacity of a bulkhead or flume?

A. Well, I wouldn't— You would have to leave it wider at the lower end so as to leave the rubbish go through.

Q. Is there any limit to the width you would have at the lower end? Suppose you had it a mile wide, would that make any difference?

A. No, but I wouldn't try to narrow it up.

Q. Well, now, supposing you had a bulkhead or flume to carry Gold Creek, and you widened it out materially at the end, what would be likely to happen? What would be likely to happen with the debris and timber and stumps coming down?

A. They would go down through.

Q. They would?

(Testimony of John Wagner.)

A. Yes; they would be more apt to go on through. It's like putting a demijohn in the lower end of the creek and trying to catch all the water through a demijohn.

Q. Would it cause the debris to lodge— If you widened it out at the outlet, wouldn't it have a tendency to cause the stumps and rubbish to gather at the outlet? A. Huh?

Q. Wouldn't widening it out at the outlet cause the stumps and [94] rubbish to gather at the outlet?

A. They would go out; they wouldn't block it.

Q. You wouldn't pay any attention to the debris or the course of the stream?

A. No; it would go out the way it always had. If it wasn't narrowed up, it would go out; water always does. I wouldn't try to run it up hill, though.

Q. Would that make any difference as to the width of the outlet and the debris; that is, the swiftness of the current?

A. Well, it would make a difference. If it had a steep grade it would be better.

Q. Better for what?

A. Better to carry the rubbish out.

Q. Better to have it wide or narrow?

A. No; wide.

Q. So, in building a flume or bulkhead, you would always have an intake narrower than the outlet? That is proper, is it? A. Yes.

(Testimony of John Wagner.)

Redirect Examination.

(By Mr. COBB.)

Q. The difference between the hypothetical, supposed case, where they widen them out and where they narrow them is simply the difference between choking them up and leaving them free for the water to carry out whatever it has power to do?

A. Sure; gives it its own course.

Q. If it chokes up because of a narrowing of it, the debris and so on becomes wedged so it can't be moved? A. Yes.

Q. Is that it? [95]

A. Yes, sir; that's what happened down there.

Mr. COBB.—That's all.

Recross-examination.

(By Mr. FAULKNER.)

Q. What comes down Gold Creek, or this flume you're talking about? A. Rubbish of all kinds.

Q. What kind? Describe to the jury what comes down there?

A. Well, stumps, timbers, bridges and anything that comes loose up there.

Q. Well, I mean they are not coming down every day, bridges and so on.

A. Oh, no; when there is a flood, I mean.

Q. Doesn't sand come down, and gravel?

A. Sure.

Q. And if you have a wider outlet, that sand and gravel is less likely to lodge than if you have a nar-

(Testimony of John Wagner.)

rower outlet, is it? The sand and gravel would be kept clearer with a wider outlet?

A. No; the sand generally fills up at the mouth, sometimes.

Q. Yes.

A. But, then, if you keep it narrow, sand will clear through better.

Q. The sand will clear through better. That's all.

Mr. COBB.—Plaintiff rests.

And thereupon the defendants, to maintain the issues on their part, introduced the following evidence, to wit:

Testimony of Allen Shattuck, for Defendants.

ALLEN SHATTUCK, one of the defendants herein, called as a witness on their behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Shattuck, please state your name? [96]

A. Allen Shattuck.

Q. You are one of the defendants in this case?

A. Yes.

Q. And you are familiar with the property mentioned in the complaint, are you? A. Yes.

Q. Mr. Shattuck, I will ask you if you own that tract of land described in the complaint?

A. I own a quarter interest.

(Testimony of Allen Shattuck.)

Q. A quarter interest. And who owns the balance?

A. Mr. Casey owns a half interest and my brother Henry owns a quarter interest.

Q. When did you acquire that? A. In 1903.

Q. 1903? A. 1903.

Q. Where did you get that?

A. Bought it from a man by the name of Calhoun.

Q. What happened, if anything, after you bought it?

A. It was located as placer claim on account of the fact that the—

Mr. COBB.—(Interrupting.) I think all that is immaterial. It's admitted. I simply want to save the record. The trouble they had in getting title to it is wholly immaterial.

The COURT.—Yes.

Q. How large was that tract?

A. It contained approximately thirty-five acres.

Q. Thirty-five acres. Now, you say you acquired it in 1903? A. Yes. [97]

Q. What was done with it between 1903 and 1913, if anything?

A. Nothing, except that it was used as a cow pasture.

Q. Now, where do you live? A. I live—

Q. (Interrupting.) With reference to the tract of land? A. I live on the tract of land.

Q. You live on it? A. Yes.

Q. At what point?

A. On the southeastern part of it.

(Testimony of Allen Shattuck.)

Q. How long have you lived there or in that vicinity? A. Since 1905 or 6.

Q. You live in sight of Gold Creek? A. Yes.

Q. Now, in 1912, what, if anything, did you do with the land?

A. We had it platted along about 1912.

Q. You had it platted? A. Yes.

Q. Who made the survey?

A. Fred Wettrick and Lloyd G. Hill.

Q. What was the purpose of having it platted?

A. To offer it for sale as town lots.

Q. When was that done?

A. It was done, I believe, in 1912, or early in 1913; some time in that vicinity.

Q. In 1912 and prior to that time were you familiar with the course of Gold Creek as it flowed out over that land? A. Yes.

Q. Where did it go at that time? Point out to the jury on the plat Plaintiff's Exhibit "A," where Gold Creek went in its [98] course as it came down through the canyon? A. At what time?

Q. Prior to 1912; prior to 1912 or 13.

A. The greater part of the creek ran down what is marked on this chart as "the original channel," prior to 1912.

Q. Now, you say the greater part of it?

A. Yes, sir.

Q. Where did the other part of it go?

A. Sometimes it flowed—prior to 1912, there was a small stream flowing down what is marked as the "old channel," and a part of it flowed down near

(Testimony of Allen Shattuck.)

what is marked as the "new channel" on this plat.

Q. Now, was there any water flowing in what is marked as the "cribbed channel"?

A. In some parts of it.

Q. Now, in 1913— You say that was prior to 1913? A. Yes.

Q. Now, in 1913, what, if anything, happened to the creek bed?

A. High water that occurred in the fall of 1913 filled up the original channel?

Q. Filled up what is marked as the "original channel"? A. Yes.

Q. Where did the creek go then?

A. The creek spread out through different channels after that channel was filled up. Some of it flowed down what is marked on this chart as the "cribbed channel," and some of it flowing down in the vicinity of what is marked as the new channel.

Q. Where was the largest part of it going after 1913?

A. The larger part of it was going down in the vicinity of what [99] is marked as the "cribbed channel" and what is marked as the "new channel."

Q. Was there a channel on what is marked on the map as the "cribbed channel"? A. Yes.

Q. 1913? A. Yes, sir.

Q. And had there been water going over there before that? A. Yes.

Q. Now, in 1913, what did you do? You say there was a period of high water in 1913. What time was that?

(Testimony of Allen Shattuck.)

A. In the fall; I don't recall what time in the fall.

Q. That was a considerable flood, was it not?

A. Yes, it was.

Q. Now, in 1913, what did you do with the creek, if anything?

A. We didn't do anything with the creek in 1913.

Q. Well, in 1914?

A. We built a cribbing on each side of the channel.

Q. Now, was that built on the main part of the channel, what was then the main channel?

A. What we considered the main channel.

Q. At that time? A. Yes.

Q. Where was that cribbing built?

A. I don't understand.

Q. I say, where was it built, on the banks?

A. Built on the banks of the stream, as it flowed down through the tract.

Q. Now, will you describe to the jury how that cribbing was built? [100]

A. We dug trenches on each side of the channel, at a distance sufficiently wide apart to hold the stream. These trenches varied in depth from down to the surface, or the bed of the creek, or the lower surface of the bed of the stream, to a greater depth as we ran into obstructions along the bank; that is, the bank varied and we laid, or dug the trenches in order to make a smooth surface; but in all parts of that course, the cribbing was as low as, or lower than, the bed of the stream. The trench was about four feet wide.

(Testimony of Allen Shattuck.)

Q. On each side?

A. On each side of the creek bed. And we laid a double row of piles in each one of these trenches the full length of the trench. We put cross-pieces on the trench of the same material, we spiked the cross-pieces to the piling and sawed off the cross-pieces on the inside of the cribbing sufficiently close to the cribbing to allow a smooth surface—the surface exposed to the creek—but left enough projection there so that the drift bolts that we drove in to secure the piles would hold, and then after these cross-pieces were nailed on, at a distance of about, I should say, ten feet, another row of piling was put on top of those, a double row of piling, and built on up to the height we wanted it and the space in between was filled with rocks and brush.

Q. Any sand bags in there?

A. Sand bags? There was some sand bags placed afterward. Those weren't placed on there at the time we built the bulkheads.

Q. Now, what was the length of the piling? Do you know anything about that?

A. Well, the length of the piles varied from fifty to a hundred feet. They were the best and longest piles we could get, because the longer the piles the more rigid the flume would be. [101]

Q. You got the longest piles you could?

A. Yes.

Q. You didn't build it with piles twenty-five or thirty feet long, as Mr. Wagner said?

A. I don't believe there were any piles in the

(Testimony of Allen Shattuck.)

flumes so short as that.

Q. What was the nature of the construction of the bulkhead where it emptied into the tide water?

A. It was built by driving the piles in the bank of the creek, and lining it on the inside with heavy planks in order to make a perfectly smooth surface inside.

Q. Now, what was the width, what was the distance between those two bulkheads on the banks of the stream?

A. On the upper course, they varied from thirty to thirty-five, $37\frac{1}{2}$ and forty feet, and in the lower course, the bulkheads or the flume sides were about twenty-six feet wide.

Q. Why was that made twenty-six feet at the lower portion?

A. In order to enable the, or to confine the water to such an extent as would keep the bed of the creek clear. We thought that if we built the cribbing too far apart, it wouldn't confine the creek sufficiently to allow a swift enough flow to keep the bed of the creek clear, and the lower part of this part of the stream bed was composed mostly of finer gravel than the other part of the stream bed, necessitating a narrower channel in order to increase the flow enough to make it clear itself or keep itself clean.

Q. How far up the creek from the mouth of that did this bulkhead extend?

A. I don't understand.

Q. How far did it extend northerly? You might show the jury here, if you can. [102]

(Testimony of Allen Shattuck.)

A. The cribbing?

Q. The cribbed channel; yes, the cribbing, if it is shown on that.

A. Well, it extends up to near the middle of block 205.

Q. Now, do you know where the Gold Creek bridge was that was mentioned here?

A. There are two bridges across Gold Creek.

Q. Well, the Gold Creek bridge that is up here going to the cemetery.

A. That is beyond the limits of this.

Q. Now, did the cribbing extend up to the bridge?

A. No; it did not.

Q. Did it extend under the pipe line of the electric light company, mentioned by Mr. Stearns?

A. No; the upper Gold Creek bridge and the pipe line are several hundred feet beyond the limits of this map.

Q. Mr. Shattuck, I might ask you if prior to 1918, or prior to 1913, you ever had any trouble down there with water?

A. Well, the water often spread out and it ran over the whole lower part of the tract.

Q. I might ask you if you ever had any trouble with water on the easterly side or southeasterly portion of the tract? A. Yes; we did.

Q. Where was that?

A. That was in the vicinity of Ninth Street—Ninth and B Streets.

Q. Point that out to the jury.

(Testimony of Allen Shattuck.)

A. (Pointing to chart.) Down in this vicinity here.

Q. Now, what was down there at that time, prior to 1913, in that vicinity, what buildings? [103]

A. The power plant of the Alaska Electric Light and Power Company was below that.

Q. Did you have any trouble with water over in that direction?

A. Yes, water often flowed down past it, in a channel past the light company's plant, threatening the light company's plant and the property of a man by the name of Mike Donaher that lived west of the light plant or a short distance from it.

Q. And did you do anything there regarding the water?

Mr. COBB.—I think I will object to that. It is irrelevant and immaterial. The point he is now testifying about is five or six hundred feet farther toward the bay. It seems to me that it is immaterial.

Mr. FAULKNER.—The point we wish to bring out is this: the plaintiff contends that the creek flowed to the westward. Now, the testimony is going to show that the main channel or creek didn't flow to the west, but that there was water going to the easterly side so that there was danger down there from floods, making it very material.

Mr. COBB.—As to water below there? The evidence is that after it got out of the canyon below the high banks, just below the canyon, it spread out all over the flats.

(Testimony of Allen Shattuck.)

The COURT.—His testimony, as I—

Mr. COBB.—(Interrupting.) I mean during flood waters; high waters, it spread all over that flat.

The COURT.—Objection overruled. Repeat the question. (Question repeated by reporter.)

A. Yes, it was necessary to put in a wing dam in the vicinity of Ninth and B streets to keep the water flowing down there and damaging property of the light company and the [104] building of Mike Donaher.

Q. Now, Mr. Shattuck, where is the lowest portion of that tract?

Mr. COBB.—What year was that? I didn't catch it.

Mr. FAULKNER.—How's that?

Mr. COBB.—What year was that?

A. We built them several times there prior to 1915.

Q. (By Mr. FAULKNER.) Who did that, paid for that work?

A. The owners of Casey-Shattuck Addition and the light company and Mr. Donaher did the work jointly.

Q. The Pacific Coast Company have anything to do with it?

A. I am not sure about the Pacific Coast Company; but they may have.

Q. Now, where is the lowest portion of the tract?

A. The lowest portion of the track is immediately toward the channel from the property of the Alaska

(Testimony of Allen Shattuck.)

Electric Light and Power Company.

Q. In which corner would that be, which direction?

A. That would be south of a point at the intersection of Ninth and B streets.

Q. Southeasterly?

A. It would be a little southeast; yes.

Q. Now, where were you, Mr. Shattuck, on the 26th of September, 1918? Were you here?

A. I was.

Q. Where were you that day?

A. In town the first part of the day and the latter part of the day I was out on the Casey-Shattuck Addition.

Q. What time did you get there?

A. The first time about nine o'clock in the morning.

Q. What did you observe at that time with reference to the [105] creek or the waters?

A. The creek was quite high, but it was practically all being carried by the cribbed channel.

Q. Practically all the water was in the cribbed channel? A. Yes.

Q. At that time. Did you see anything coming down at that time?

A. Not that time. I was only there for a moment or so.

Q. Now, where is Willoughby Avenue?

A. It runs to the seaward of the Casey-Shattuck Addition.

Q. Across the channel called the "cribbed chan-

(Testimony of Allen Shattuck.)

nel"? A. Yes, across the cribbed channel.

Q. And across what is marked on the plat as the "original channel"? A. Yes.

Q. Now, how long did you stay there when you went down the first time, in the morning?

A. Just a few moments.

Q. Then where did you go?

Q. I went down to the office and went to work.

Q. Did you return to the tract of land again?

A. Yes; about half-past twelve or quarter to one.

Q. What did you observe at that time with reference to the water?

A. I observed that the water was very high and doing a great deal of damage.

Q. Where was it going?

A. It was flowing down along both sides of and in the cribbed channel, mostly.

Q. And on both sides of the cribbed channel?
[106] A. Yes.

Q. Now, was any water going on the westerly side of the cribbed channel at that time? A. Yes.

Q. I'll hand you a photograph, Mr. Shattuck, and ask you what that represents, if you know—what section of the country does that represent?

A. It represents the Casey-Shattuck Addition.

Q. And is the creek shown on there? A. Yes.

Mr. FAULKNER.—We'll ask to have that introduced in evidence.

Q. At what time does that represent the property, before the 26th of September, or after?

A. I'll have to look at it again.

(Testimony of Allen Shattuck.)

Q. What time? A. It was after the flood.

Mr. FAULKNER.—We'll ask to have that marked as plaintiff's exhibit.

(Received and marked No. 1, Plaintiff's Exhibit.)

Q. Now, Mr. Shattuck, I'll ask you to come down and show this picture to the jury and show the course on there, as nearly as you can, of the cribbed channel.

(Witness does so.)

Q. Where is the Gold Creek bridge? Just show to the jury where the Gold Creek bridge is.

A. Which Gold Creek bridge?

Q. Well, the one that goes to the cemetery?

A. It would be beyond the lower left hand corner of this exhibit.

Q. Then, where did the cribbed channel begin?

A. The cribbed channel began shortly, over at this corner and [107] and continued down the stream, down past Willoughby Avenue.

Q. Which way did it go? A. Toward the—

Q. Well, point it out with a pencil.

A. Yes. It went down approximately— The upper part of this cribbing here is shown on the westerly bank. On the easterly bank is a part of the original cribbing. The upper part of the cribbing, as shown on this exhibit, on the easterly side, is a part of the original bulkhead, and it went on down across this sand bar here (indicating). Here is another one. Ran down through and takes another course here (indicating), and went down in this direction here (indicating).

(Testimony of Allen Shattuck.)

Q. On which side of the house?

A. This is the course here (indicating). This is the lower Gold Creek bridge (indicating); from here down to the left of the house, down to Willoughby Avenue at this point.

Q. Now, when you got out there in the morning, you say there was water on both sides of the cribbed channel—I mean when you got out there about noon? A. Yes.

Q. What, if anything, happened up at the upper course of the cribbed channel, on the westerly bank before you reach the cribbed channel?

A. That bank washed out.

Q. So that going down the stream, I mean looking down the stream from the Gold Creek bridge, the right-hand bank, you say, had washed out before you reached the cribbed channel? A. Yes.

Q. Did the water flow over there at that time? [108] A. Yes.

Q. What was the nature of that bank; that country there?

A. That bank was covered with stumps and trees, indicating it had been there many years.

Q. Point out to the jury where that was?

A. That was along the lower left-hand corner of this picture, down to a point opposite the cribbing that is nearly opposite the cribbing that is shown on the easterly bank.

Q. Now, what structures are up there on that bank that washed out, if any?

A. Buildings formerly occupied by the Northern

(Testimony of Allen Shattuck.)

Laundry Company.

Q. And the area that you have marked there "washed out,"—the area that you pointed out to the jury? A. Washed-out area?

Q. Yes.

A. That is the area that was formerly protected by the natural bank I spoke of.

Q. You say that was a high bank, with stumps on it? A. Yes.

Q. About how big is that washed out area that is marked, if it is correctly marked, on this picture? I mean how far would that be from the creek over the upland side?

A. Oh, probably a couple of hundred feet.

Q. Couple of hundred feet which way?

A. From the location of the original bank towards the Northern Laundry Building.

Q. Down this way, then, would that be?

A. Well, approximately, across it, at right angles from the creek.

Q. Washed it out almost to the laundry, as shown on the picture? [109] A. Yes.

Q. Now, what did you find out there, Mr. Shattuck? I might ask you this first: to what part of the tract did you go when you went out at noon that day?

A. I went down on Ninth Street, on the easterly side of the creek.

Q. Went out to Ninth Street? A. Yes.

Q. On the easterly side of the creek? A. Yes.

Q. Did you cross the creek?

(Testimony of Allen Shattuck.)

A. Not that time. I was across the creek during the day, later in the day.

Q. Were you on the same side of the creek as Mr. Eikland's house? A. Yes.

Q. How long did you remain there?

A. Oh, perhaps a half or three-quarters of an hour, possibly a little longer.

Q. Now, at that time could you see the bulkhead?

A. No; I could not.

Q. Why?

A. It was completely sumerged with water.

Q. Both sides of it? A. Yes.

Q. Now, did you see anything coming down the creek at that time?

A. Yes; I saw a great deal of debris down there, coming down the creek.

Q. What did it consist of?

A. Logs and stumps and timbers. [110]

Q. Where did that go?

A. That went down the course of the stream and lodged at Willoughby Avenue.

Q. Now, I'll hand you another photograph and ask you what that represents.

A. That represents the jam of debris that lodged against Willoughby Avenue at the time of this flood.

Q. Is that picture dated?

A. I don't think it is.

Q. Well, the date is shown down in the corner, "3-12-19."

(Testimony of Allen Shattuck.)

A. I suppose that is what it is meant to be, March 12, 1919.

Q. That represents, then, the portion after the flood? A. Yes.

Mr. COBB.—What did he say it is?

Mr. FAULKNER.—It represents the lower portion of the Bulkhead next to Willoughby.

Mr. COBB.—Oh, that is the pile of debris that lodged down there?

Mr. FAULKNER.—Yes.

Mr. COBB.—Oh, no; we have no objection.

Mr. FAULKNER.—We'll ask that it be marked Defendant's Exhibit No. 2.

(Whereupon said photograph was received in evidence and marked Defendant's Exhibit No. 2.)

Q. I'll hand you another photograph and ask you what that is?

A. That represents the upper course of Gold Creek as it enters Casey-Shattuck Addition.

Mr. FAULKNER.—Just a minute, I want to show this to the jury. (Shows exhibit No. 2 to jury.)

Q. I might ask you where this picture was taken?

A. Taken from some point near the bridge, the upper Gold Creek [111] bridge.

The COURT.—The same as Defendant's Exhibit No. 1 in the other case?

Mr. FAULKNER.—Yes. We'll offer this as Defendant's Exhibit No. 3.

The COURT.—Yes.

(Whereupon photograph referred to was received

(Testimony of Allen Shattuck.)
in evidence and marked Defendant's Exhibit No. 3.)

The COURT.—That was taken from what you call the Gold Creek bridge?

The WITNESS.—The upper bridge.

The COURT.—Yes. On the road going out to the cemetery?

The WITNESS.—Yes.

Mr. FAULKNER.—I think we better refer to that as the Gold Creek Bridge and the other as the Ninth Street bridge, or Tenth Street bridge.

Q. Now, on this photograph, which is marked Defendant's Exhibit No. 3, there is a portion of the cribbing shown there on the right-hand side, when was that put there?

A. That was put there after the flood.

Q. After the flood? A. Yes.

Q. And at the time of the flood, September 26, 1918, did the cribbing extend up to that point?

A. No.

Q. Will you take a pen and make the letter X on the top of the building you have described as the Northern Laundry?

(Witness does so.)

(Photograph shown to jury.)

Q. I hand you another photograph, Mr. Shattuck, and ask you what that represents, if you know?

A. That represents a section of the Casey-Shattuck Addition near [112] the native hospital.

Q. Is that near the mouth of the creek?

(Testimony of Allen Shattuck.)

A. It is.

Q. When was that taken?

A. That was taken subsequent to the flood.

Q. Any objection to that, Mr. Cobb?

Mr. COBB.—Yes, I object to this. Just let me ask one question. This is seven or eight hundred or a thousand feet below, downstream from the property of Mr. Eikland?

A. It is several hundred feet.

Mr. COBB.—How's that?

A. Yes, sir; it's several hundred feet below the property that was damaged.

Mr. COBB.—It is irrelevant and immaterial to any issue in this case; doesn't illustrate anything that is material to the inquiry.

Mr. FAULKNER.—The purpose of it was to show what caused the jam. Witnesses have testified about a jam.

The COURT.—About the narrowness—

Mr. FAULKNER.—Yes. And Mr. Eikland's house, that was 500 feet from his property.

Mr. COBB.—Well, that is only an estimate.

The COURT.—Objection overruled.

Mr. FAULKNER.—That will be Defendant's Exhibit No. 4.

(Whereupon said photograph was received in evidence and marked Defendant's Exhibit No. 4.)

Q. I'll hand you another photograph, Mr. Shattuck and ask you what *what* represents?

A. It represents a section of the Addition near the intersection of Ninth and B Streets. [113]

(Testimony of Allen Shattuck.)

Q. Before or after the flood?

A. After the flood.

Q. Of 1918? A. Of 1918.

Q. Where was Mr. Eikland's house with reference to that picture, if you can show it?

A. It was back of the picket fence shown on the right-hand side of the picture.

(Whereupon the foregoing photograph was offered and received in evidence and marked Defendant's Exhibit No. 5.)

Q. (By the COURT.) I want to ask you just one question. I think that (exhibiting) is the same picture, isn't it? A. Yes.

Q. Is that the flume running down there?

A. Down here?

Q. Yes, by the picket fence?

A. No; that is the bed of the creek after the flood. That is a portion of the sidewalk in front of the fence.

A JUROR.—Was this bulkhead built after the flood? A. Yes.

A JUROR.—It had been built after the flood?

A. That was all built after the flood.

The COURT.—Now, I just want to ask another question. Did the house of Mr. Eikland—was it situated back of this fence or was it situated directly back of where the sidewalk is?

A. This fence at the right-hand corner of the picture, extreme right-hand corner of the picture, where the fence is shown, is practically the corner of Mr. Eikland's lot and his house sat back of that

(Testimony of Allen Shattuck.)

fence, toward the left. That is, his lot was a fifty-foot lot and this (indicating) is one corner of [114] it. The other corner extended over here, toward where the creek is shown.

The COURT.—Toward the lower end of the sidewalk?

A. Yes; and his house sat toward the middle of the lot.

Recess until 2 o'clock P. M. this day, Nov. 14, 1922.

2 o'clock P. M., Nov. 14, 1922.

Court met, pursuant to recess.

ALLEN SHATTUCK (on stand).

Direct Examination (Resumed).

(By Mr. FAULKNER.)

Q. Mr. Shattuck, I asked you this morning about the construction of the bulkhead. Now, who did that work?

A. A man by the name of Ole Opsahl was employed to do the actual construction work.

Q. Who was Opsahl? Just what was his business? A. He's a man who—

Mr. COBB.—We shall object to that as irrelevant and immaterial. Doesn't amount to anything. It's a preliminary question, but it may be eliminated. I presume counsel will follow it up with testimony to show that he was competent.

Mr. FAULKNER.—The purpose of the question is to show what was done. The gist of the action

is whether the defendant was negligent in the construction of the bulkheads. Now, Mr. Shattuck, not having built it, we want to find out what steps he took to procure a man that was competent, what he did. I think the same matter was admitted at the other trial.

The COURT.—I'm inclined to think that the objection should be overruled. [115]

Mr. COBB.—Will the Court hear me just a minute?

The COURT.—Yes.

Mr. COBB.—This is not a case of fellow-servant or any pretense to it.

The COURT.—No.

Mr. COBB.—The gist of the action is not, as stated, negligence on their part. There is an element of negligence enters into it, but as to the care which the plaintiffs were under a legal obligation to use, it was a personal duty which they could not delegate to somebody else and say that they had exercised due care in selecting him and thereby escape liability. Now, it is immaterial whether he was a careful man or not. If they were negligent, why they are responsible for it. In other words, it is a nondelegable duty. The purpose of this testimony is to show that they had exercised due care regarding a man by the name of Opsahl.

The COURT.—That may be so under one view of the case, but under the testimony which you have introduced thus far, you have shown faults both in the construction of the flume, the manner of the

(Testimony of Allen Shattuck.)

construction of the flume as well as the size of the flume, and that is the actual personal manner of constructing the flume.

Mr. COBB.—Yes.

The COURT.—That it consisted of logs; that the logs didn't go to the bottom of the stream and also that the logs were not properly tied together. Necessarily, that must have been delegated by the man that caused it to be constructed to his employees. There is also another element as to the physical manner of construction, with reference to whether it was [116] narrowed at the mouth and whether that in itself caused obstructions in the flume which in turn caused it to overflow. So there is a double view of it the jury must take as to the question of negligence; and also the question of whether the flume was constructed carefully enough. There have been several statements of negligence heretofore developed, but the testimony is, I think, under the circumstances, especially important for the defendants to show that they employed due care in getting the proper man to construct the flume. In that regard I think the evidence is material.

Mr. COBB.—The point of our objection is that it is a duty they could not delegate—

The COURT.—(Interrupting.) Objection overruled.

Mr. COBB.—We'll except.

A. Opsahl was a man whom we believed, from his reputation, to be—

(Testimony of Allen Shattuck.)

Mr. COBB.—(Interrupting.) We object to his stating what he believed. That is simply a matter of opinion, unless there is some foundation.

The COURT.—Yes, he may state what he did find out, whether he was qualified to build a flume of that nature.

Q. Where did he come from?

A. Came from Montana.

Q. What was his business?

A. Building flumes of the character of this one that we wanted to build and other work.

Q. Where did he live when he lived in Juneau?

A. He lived out on the Addition.

Q. Down near Gold Creek? [117]

A. Yes, on the westerly side of Gold Creek, near its middle course.

Q. Now, Mr. Shattuck, at the time the Bulkhead was constructed, did you measure any other channel to determine its capacity? Was there any other channel and did you measure it?

A. There was not. We felt that we couldn't get any information that would be of any value to us, in building the bulkhead of the size necessary to carry the water.

Q. Now on the day of the flood on September 26, 1918, you stated that the water cut over on the westerly bank of the stream, as it came out under the Gold Creek bridge towards the laundry.

A. Yes.

Q. What is the nature of that place there, if you know, where the stream went over the westerly

(Testimony of Allen Shattuck.)

bank there before it reached the bulkhead? What did it do there?

A. It cut away the natural bank on that side of the stream.

Q. What was on that bank?

A. Stumps and a growth of brush and so on.

Q. Was it a permanent bank?

A. From all appearances, yes. It had been there for a good many years.

Q. Do you know how deep the water cut in there? A. Vertical depth, or?

Q. Yes. A. I should say eight feet.

Q. What did it leave there on the bottom?

A. Rocks and gravel.

Q. As shown in the picture? A. Yes. [118]

Q. Now, you say—I think you testified this morning that there was water running on both sides of the cribbed channel at the time you went down there at noon? A. Yes.

Q. Where did that water go that was on the westerly side of the cribbed channel?

A. Most of it followed the course of the cribbed channel?

Q. Down in this (indicating) direction?

A. Yes.

Q. Did any of it go any other direction?

A. Some of it went in the direction of the new channel, as marked on that exhibit.

Q. On the westerly side?

A. On the westerly side, yes. Some of it went down Eleventh Street.

(Testimony of Allen Shattuck.)

Q. Now, was there any damage done down on Eleventh Street, or down on Tenth Street, I mean, towards—

Mr. COBB.—We object to that as irrelevant and immaterial.

Mr. FAULKNER.—Well, the testimony of Mr. Eikland was that there was no water went on the westerly side of Gold Creek and we want to show that there was. Mr. Shattuck has testified that there was water on both sides of the cribbed channel. We want to show the general nature of the flood.

The COURT.—Objection overruled.

Q. What if any damage was done down there?

A. There was some damage done on E Street—

Q. On what?

A. On E Street, which is an extension of Wiloughby Avenue.

Q. Oh; that is, clear down towards the tide flats?

A. Yes; at the intersection of E; at the intersection of Tenth [119] and E and Eleventh—at both these locations—some damage done at each of those places by water, to houses.

Q. Whose houses were they?

A. One of them belonged to a man by the name of Sullivan and the other to Mrs. Kabler, who is now Mrs. Frank Forrest.

Q. What was the situation on E Street at the time of the flood with reference to the water?

A. Water flooded E Street at several points; crossed it on Tenth Street, and on Eleventh Street

(Testimony of Allen Shattuck.)

it crossed it and the depression on the easterly side of these streets was all filled with water.

Q. What was the damage done? What did it do to Mr. Sullivan's house?

A. Well, it only flooded his house. It didn't carry his house away.

Q. What did it do to Mrs. Kabler's house?

A. Ran through the basement of the house and did some damage from flooding.

Q. I think you said you went down there about twelve o'clock on the 26th of September?

A. Yes; the second time.

Q. The second time, yes. Where did you go? Did you cross the Gold Creek bridge at that time?

A. No—

Q. (Interrupting.) That is, the bridge here?

A. No; I did not. I went to the easterly side, or westerly side of the creek by way of Willoughby Avenue, when I went over there. Most of the time after Eikland's house went out, I went down Willoughby Avenue and assisted people in moving out of that section. [120]

Q. That was after Mr. Eikland's house went out?

A. Yes.

Q. But before his house went out, where did you go?

A. The only place I was at prior to and up to the time that Mr. Eikland's house went out was the ground in the vicinity of Ninth and B Streets. I went from my house down to the location of the

(Testimony of Allen Shattuck.)

Eikland house and was there until his house went out.

Q. You remained there until his house went out?

A. Yes.

Q. What was the nature of the stream there at that point?

A. Very heavy flow of water all through the flats there from the location of Eikland's house on up beyond the west side of the flume.

Q. What was in this area marked "new channel" and "Washed-out area"?

A. The stream was going through there.

Q. What was in the stream?

A. Debris of all kinds—logs and stumps, bridge timbers and pieces of cabins.

Q. Was there any of that sort of debris in the water, that you noticed, on the westerly bank of the cribbed channel?

A. I couldn't see that far over there.

Q. Did you observe, at any time afterward, anything that was coming down the westerly side of the cribbed channel?

A. Some debris there, but most of it lodged, lodged between what was the mouth of the old original channel and the outlet of the cribbed channel.

Q. Well, I hand you Defendant's Exhibit No. 4 and ask you if you see anything there that came down with the flood? [121]

A. Yes; that represents a great lot of debris that collected in the vicinity of the outlet of the flume.

(Testimony of Allen Shattuck.)

Q. Did any of it collect beyond that, on the westerly bank of the cribbed channel?

A. Yes, collected all along the upper side of Willoughby Avenue as far as the outlet of what is marked on plaintiff's exhibit there as the "original channel."

Q. And here is Defendant's Exhibit No. 2. I will ask you if you see any debris and rubbish on that that went down on the westerly bank of the flume, of the cribbed channel?

A. Yes; yes, that shows the condition of the country above, on the northerly side of Willoughby Avenue, from the outlet of the cribbed channel to approximately the location of the outlet of the original channel on Plaintiff's Exhibit "A."

Q. Now, do you know where the Gold Creek bridge is—what we refer to as the Gold Creek bridge, Mr. Shattuck? A. Yes.

Q. Where was it? You located it this morning, I believe.

A. Beyond the limits of that Plaintiff's Exhibit "A"—several hundred feet.

Q. What happened to that bridge?

A. It went out.

Q. After you left Mr. Eikland's house on the easterly bank of the channel, where did you go then?

A. Well, I am not positive as to which direction I went; as I stated before, I spent most of the balance of the day, when I was out there, assisting people who wished to move, who were located on

(Testimony of Allen Shattuck.)

Willoughby Avenue, but during the afternoon I was up to the site of the bridge after it went out.

Q. Before we come to that—you say you went down Willoughby [122] Avenue from Mr. Eikland's place? A. Yes.

Q. Did you go to the vicinity of the hospital?

A. Yes.

Q. What, if anything, did you observe there?

A. I observed people who were interested in the hospital, taking people out of the hospital in row-boats, or trying to get them out without drowning them.

Q. Did you see me there that day?

A. Yes; you were there.

Q. Did you see how we got the people out of the hospital?

A. Why, there was a rope stretched, as I recall it now, and they worked each boatload of people along that rope.

Q. How deep was the water around the hospital? Was it so you could get to the hospital by land?

A. No.

Q. At any point? A. No.

Q. Now, will you point out to the jury just where the hospital is?

A. Located on block 220, on what is marked as "school reserve" on plaintiff's exhibit—

Q. On which side of the cribbed channel is that?

A. Westerly side of the cribbed channel.

Q. Where did you go from there, Mr. Shattuck?

A. After we got through moving people on Wil-

(Testimony of Allen Shattuck.)

loughby Avenue, I walked around to different points or parts of the Addition, to see what damage had been done in the different sections, and I was around there generally that afternoon.

Q. Did you go down on E Street? [123]

A. Yes; we have property on E Street, and I went down there to see what damage had been done down there.

Q. Did you come back to the Gold Bridge again?

A. Yes.

Q. What did you observe then?

A. The bridge had gone out. I went over there with Mr. Behrends.

Q. How long had this bridge been there?

A. Been there since some time in about 1914. It was comparatively a new bridge.

Q. Was there a bridge there prior to 1914?

A. Yes.

Q. What was done to that bridge?

A. I don't recall what happened to that bridge, but it was replaced with a new bridge, the bridge that I speak of. Just what happened to the old bridge, I don't know.

Q. How long had it been there?

A. The old bridge?

Q. Yes.

A. Been there since I came to the country in 1897.

Q. You don't know whether it was taken out, torn down, or taken out by a flood?

A. No, I don't recall that.

(Testimony of Allen Shattuck.)

Q. You don't know where it went to? A. No.

Q. Did you observe any other damage that was done that day in Juneau by this flood? A. Yes.

Q. What?

A. Well, there was considerable damage over on what is known as "Swede Hill." [124]

Q. What was done there?

A. A number of houses slid off the sidehill, washed off the sidehill from the flood of water that came down there. Some of the houses had been there for a great many years, at least they had been there since I came to the country. There was some damage on the edge of a little basin up near the intersection of Seventh and Gold Belt Avenue, up where Charley Garfield's house is and Fred Wettrick's house is. Some dirt slid off; considerable movement occurred there.

Q. What was done there?

A. A slide, a landslide occurred there and undermined Mr. Garfield's house.

Q. Now, you say the houses on what is known as Swede Hill were there since you came to the country? A. Yes.

Q. How long have you been here?

A. I came here in 1897.

Q. Do you know how many of those houses were washed down that day?

A. Oh, there were, I should say, four or five in this one place.

Q. Now, did you observe any damage done to the Gastineau Hotel that day?

(Testimony of Allen Shattuck.)

A. Yes the slide I speak of went into the back end of the hotel and the mud and water went through the hotel and came out in front, doing damage, a great deal of damage.

Q. Down through the stairs, the stairway?

A. Yes; right through the hotel, from back to front.

Q. Do you know of any other damage that was caused by Gold Creek farther up? [125]

A. There was a lot of damage done on the road, on the basin road.

Mr. COBB.—Were you up there, Mr. Shattuck?

A. Yes, sir; I was up there, from the turn in the road shortly beyond the city limits, up to Jualpa basin at the Gold Creek bridge.

Q. What was the nature of that damage?

A. There were slides that had taken out the road and the water company's flume and everything that was within reach of it.

Q. What was the nature of the water company's flume that went out that day?

A. I don't— There's two flumes there, one carrying the waters of Gold Creek and one carrying their own water to the water system. Which one of those do you mean?

Q. Either one.

A. Well, it took it out wherever a slide came down, which was in a number of places. It took out the flume that supplies water to the city.

Q. You say there was another flume there?

(Testimony of Allen Shattuck.)

A. There was a flume to carry the waters of Gold Creek across their springs.

Q. That carried the whole waters of the creek?

A. Yes.

Q. What was the nature of that flume? How was it constructed?

A. It was constructed of concrete and lined with timbers.

Q. Do you know the size of it?

A. Well, not accurately.

Q. Was it as big as the bulkheads— Did it have as much capacity as the capacity of the stream marked “cribbed channel”?

A. I should say not. [126]

Q. Do you know how much lumber it was lined with? A. No.

Q. And you say that went out? A. Yes.

Q. Now, Mr. Shattuck, you said you came here in 1897 and I think you testified that you lived in sight of Gold Creek? A. Yes.

Q. All that time?

A. Not all that time, but since about 1902, or '03.

Q. Since 1903? A. Yes.

Q. Have you observed the periods of high water in Gold Creek during that time? A. Yes, I have.

Q. Have you observed the rainfall during that period?

A. Yes; in a general way; not otherwise.

Q. Now, you say you used that tract of land out there for a cow pasture for some time?

A. For a number of years?

(Testimony of Allen Shattuck.)

Q. You yourself? A. Yes.

Q. Have you been there frequently, over the addition?

A. I have occasion to go over it nearly every night to drive the cow home.

Q. Had you ever, up to that time, seen as great a flood in Gold Creek as there was in September, on the 26th, 1918? A. I have not, by any means.

Q. Did you ever see as great a rainfall as there was on that day? A. I have not. [127]

Cross-examination.

(By Mr. COBB.)

Q. Mr. Shattuck, you have been interested in the tract of land that constitutes the Casey-Shattuck Addition, you say, since 1903? A. Yes.

Q. And from that time up until it was subdivided into lots in 1913, it was used as a cow pasture?

A. A good part of the time.

Q. No buildings on it, was there?

A. Well, not many. Mr. Calhoun had properties out there.

Q. Well, that was away up on the bank?

A. No; that was on the easterly side of Gold Creek, but on the flats.

Q. But on the higher portion of the flats. There was nothing on the lower portion of the flats.

A. It was about the same elevation as Mr. Eikland's house.

Q. How's that?

(Testimony of Allen Shattuck.)

A. I say, it was about the same elevation as Mr. Eikland's house.

Q. Practically the same elevation as Mr. Eikland's house. Now, during that period of time you have seen all the flats there, southerly and westerly of where Mr. Eikland's house was built, covered with water? A. No.

Q. Never saw it? A. No.

Q. Never saw the channels across there overflow?

A. Yes; the channels overflow and the water went on out in different directions, but I never saw the whole flats covered.

Q. Well, when there was flood waters in the creek and it passed [128] through the high banks, which you admit in your answer, confined the stream, opposite Eikland's house, as it did down there, it went down through a number of channels, wherever the ground was the lowest?

A. Sometimes it went through one channel and sometimes through another.

Q. Sometimes through several channels?

A. Yes.

Q. There was plenty of room for it to get away?

A. It did get away.

Q. Didn't back up anywhere. It's about a two per cent grade from there down to the sea, isn't there? A. I don't know that.

Q. Considerable grade? A. Yes.

Q. Now, then, what time in 1913 was it that you had this subdivided?

A. Well, I haven't the exact dates, but I am un-

(Testimony of Allen Shattuck.)

der the impression that it was in the winter and spring of 1912 and '13.

Q. I hand you here a blue-print and ask you what that is?

A. That is a print of the Addition.

Q. Was that the blue-print that was acknowledged by the owners and filed as a correct subdivision of the land? A. Yes, sir.

Q. Just state to the jury the date of the acknowledgment of it.

A. Eleventh day of August, 1913.

Q. What date did you sell the lot to Eikland? Eikland bought lot 6 in block 209.

A. I don't know, Mr. Cobb. I haven't had the time to look that up. [129]

The COURT.—I think that it is shown in the pleadings.

Mr. COBB.—Well, it's not material as to the exact date. He doesn't recall it.

Q. He bought that year? A. Yes.

Q. And he bought after the subdivision was made? A. Yes, I believe he did.

Q. Now, at that time Gold Creek, as shown by your own map, ran right along by the original, where the original channel is shown on Plaintiff's Exhibit No. 1 ran? A. Yes.

Q. Where the creek ran? A. Yes.

Q. Now, when you had your subdivisions made you had the whole creek bed of the channel, the old original channel there, platted, hadn't you?

A. No.

(Testimony of Allen Shattuck.)

Q. It isn't platted?

A. Water flows through the addition—

Q. (Interrupting.) How's that?

A. But that doesn't represent the whole course of the stream.

Q. Well, did it leave any part of the ground where the water ran unplatted? A. No.

Q. It's all platted into lots and blocks?

A. Yes.

Q. After you constructed the flume, or bulkhead channel that was taken out in 1918, all the ground that was platted was put upon the market and offered for sale, wasn't it? A. Yes. [130]

Q. Now, then, Mr. Shattuck, when you built that, or shortly after you built the channel— Just step down here a moment. I want you to point out on this map as near as you can, about where your cribbed channel was afterwards built.

A. (With plat before jury.) I know it started up somewheres down near the intersection of A and Eleventh Streets, a little farther north at the beginning of the west side of the cribbed channel. The east side extended a little farther up the creek, probably forty or fifty feet, then went down through—on the west side, it went down through a corner of lot one, block 208, across the intersection of B and Tenth Streets, near the northwesterly corner of block 209, went beyond the alley and made a turn on the northwesterly side of lot 8, block 213. From there it went straight to the channel, the Gastineau Channel, in a southeasterly direction.

(Testimony of Allen Shattuck.)

Q. It crossed the westerly end of what is marked here "Electric Light & Power Company S. A. homestead claim"? A. Yes.

Q. And you got a deed from the electric light and power company to the ground that you put your—

A. (Interrupting.) Yes; made some sort of exchange.

Q. Made some sort of exchange and got title to it from them to put your flume across it?

A. I believe that was the idea we had in making the exchange.

Q. Well, you did get title from them to bring the flume across there?

A. Well, the flume cut across the westerly end of their tract and left them a fraction of land on the corner, and we had a fraction that we—
[131]

Q. (Interrupting.) Well, you did that to—

A. (Interrupting.) I'm telling you that the object of our making that transfer was to make their property solid and to make our property solid.

Q. But your object had been also to put your flume across it? A. Yes—

Q. And you got that right, didn't you?

A. I expect we did. I don't recall now.

Q. And then you exchanged the fractions?

A. Yes.

Q. Now, then, I want you to point out on this—
First I'll offer this in evidence in conjunction with the cross-examination, and ask to have it marked.

The COURT.—Well, is that the official plat?

(Testimony of Allen Shattuck.)

Mr. COBB.—Yes; it has been an exhibit in the case ever since—

Mr. FAULKNER.—We haven't any copy of it.

(Whereupon said plat was received in evidence and marked Plaintiff's Exhibit "F.")

Q. Now, then, I want you to point out on this map, Plaintiff's Exhibit "F," Mr. Eikland's property, the lot which you sold him?

A. Lot six, block 209.

Q. Did you ever see that lot before you sold it to him? A. Yes.

Q. It was high ground, wasn't it?

A. Well, I won't say.

Q. That is, compared with the ground this way (indicating)?

A. The country was practically all the same elevation.

Q. Was it as low an elevation as the property down where the creek was running? [132]

A. No, the slope of the country was down towards the beach.

Q. It was covered with big stumps; had a lot of big stumps on it?

A. It might have had stumps on it. Most of that ground that was not in the creek-bed had stumps on it, but I don't know particularly about Eikland's lot.

Q. There wasn't any channel across here, going over all but five feet of its northeasterly corner, was there? A. No.

(Testimony of Allen Shattuck.)

Q. That was all done afterwards, as shown on Plaintiff's Exhibit No. 1.

A. There wasn't any channel cutting Eikland's lot at the time we sold it.

Q. Now, opposite this, and directly in the rear of it, there is a cut bank, diverting the stream there, wasn't there? A. Where?

Q. Directly in the rear of lot six, block 209?

A. Well, I don't know just what you mean by a "cut bank."

Q. Well, there was considerable depth to the bed of the stream there?

A. Well, I wouldn't say—a couple or three feet, something like that.

Q. Wasn't it more than that?

A. I don't believe so.

Q. You never measured it? A. No.

Q. But in your pleadings you admit that it was protected from all flood waters, ordinary floods, such as are likely to occur here? Is that correct?

A. As to what time? [133]

Q. The time you sold it to him? A. Yes.

Q. Now, how was the bank on the westerly side of the creek there to the rear of block 209, across—for the sake of the record—across Tenth Street, block 209; how was the bank there?

A. You mean up in the northwesterly direction?

Q. Right up here (indicating). Take this map. Right along there, say, from the corner—

The COURT.—Between what streets, A, B or C?

Q. (Continuing.) Of lot 1, block 213, at the in-

(Testimony of Allen Shattuck.)

tersection of Tenth and—what street is that?

A. B.

Q. B Street. From there on up past block 208, along this course here (indicating)?

A. Well, from a short distance back of Mr. Eikland's lot on out to the place you have mentioned there, it was composed of various creek channels. There's a creek channel running immediately behind Mr. Eikland's lot and there is another creek channel shown on this map.

Q. You claim there is an old creek channel across block 209?

A. There is; yes. There is a creek channel across block 209.

Q. Across Mr. Eikland's property?

A. No, but there is land immediately behind Mr. Eikland's property ninety feet in depth that was cut down to a fractional lot. The old creek bed ran immediately behind the Eikland lot.

Q. Now, then, you built your bulkhead on that part of the stream lying back of block 209, practically all of the original channel, didn't you—just confined it to the [134] original channel?

A. We confined it to one of the original channels.

Q. Well, the one that the water was running in?

A. Part of the water was running in it.

Q. There was no water, at ordinary stages of water in the creek, running through the whole channel (indicating) that you speak of, was there?

A. Well, yes, at ordinary stages of the tide, of the creek of the stream flow, there was some water run-

(Testimony of Allen Shattuck.)

ning down there, and when the water got higher, there was more water running down there.

Q. This was the main stream, as indicated on this Plaintiff's Exhibit "F"?

A. The main stream at the time this map was made, but not at the time the flume was built.

Q. The flume was built in 1914? A. Yes.

Q. What had changed it in the meantime?

A. The flood.

Q. How much did it change it?

A. Well, it changed it to the extent of filling the old channel up and the water was compelled to find another means of outlet.

Q. Where did it fill the old channel up?

A. Practically in the course that is marked on this map.

Q. Well, what part of it?

A. Well, it didn't fill the upper part of it because it flowed very swift there. It filled from approximately the intersection of Tenth and B Streets.

Q. Approximately from the intersection of Tenth and B Streets. [135] From there on down was it filled?

A. It wasn't all filled, but it was filled so that the water didn't follow that course. There are several places, high places, bumps, where the water forced the gravel into hummocks.

Q. It hadn't changed the channel, however, right back of block 209 appreciably, had it?

A. Well, back which way?

(Testimony of Allen Shattuck.)

Q. Northerly, right the block on Tenth Street, block 209.

A. That would be almost back of Mr. Eikland's lot.

Q. Yes. A. The intersection of Tenth and B.

Q. It hadn't changed appreciably; it hadn't appreciably changed the channel there?

A. It had from the intersection of Tenth and B.

Q. From Tenth and B.

A. Yes; that is almost directly back of Mr. Eikland's lot. That is where the fill started in. The ground from there down to the beach is not quite so steep.

Q. Well, is block 213 as high as this lot of Mr. Eikland's property?

A. Well, it is about the same elevation, most of it. Of course, where the creek channel runs through, it is a little lower, but the upper part is about the same.

Q. Don't you know that it is a good deal lower—seven or eight feet? A. No; it isn't.

Q. You don't except this corner here?

A. No; I know that isn't.

Q. And you mean to tell the jury that the ground in block 213 [136] is as high as Mr. Eikland's property? A. Before the flood; yes.

Q. Before the flood. All of it?

A. No, I didn't say all of it. I say all that part of it not affected by the stream channels that ran through there.

(Testimony of Allen Shattuck.)

Q. How much of it was affected by the stream channels?

A. Well, probably half the entire block.

Q. Half of the entire block?

A. Yes, it spread all out.

Q. Spread across there?

A. Wider than it is indicated there.

Q. And this (indicating) corner was the highest part of it—the southeasterly corner?

A. Yes; at the time we sold it, that was the highest part of it.

Q. Now, where is Mr. Nelson's property?

A. Lots nine and ten, block 213.

Q. That is lot nine and ten, 213. Where was the Ingman property?

A. Ingman property is three, in 209.

Q. Three in 209? A. Yes.

Q. I understood you to say, on your direct examination, that there was an old channel running across—before you built the flume—running across, in what is practically now marked by Mr. Stewart on his map as the “new channel”?

A. Not so far out.

Q. How is that?

A. Not so far out. The new channel was out by the flood.

Q. Yes.

A. The old channel there ran down in this vicinity (pointing); [137] ran near that point, the northwest point of Mr. Eikland's lot, but not into the lot.

(Testimony of Allen Shattuck.)

Q. Now, the ground, after the flood was over, will you point out on here about approximately where Mr. Eikland's house set?

A. Oh, somewhere near the middle, I should say, of lot six, block 209. I know he has some ground back of his lot and some in front.

Q. That was all cut out except six or seven feet, and his house all taken away? A. Yes.

Q. Now, then, you had an exhibit here in which you showed some ground over on the westerly side of it that washed out at the same time. Was that above or below the upper end of the flume?

A. Well, it was above the upper end of the flume and the upper end of the flume also was washed out.

Q. The upper end of the flume. How much ground was washed out over there?

A. Well, a great deal of ground.

Q. How's that? A. A great deal of ground.

Q. What do you mean by "a great deal of ground"?

A. What do you mean by "how much land was washed out"?

Q. I want you to tell the jury about how much space was washed out, on the west side.

The COURT.—You want the actual—

Mr. COBB.—The actual feet, as near as you can.

A. Vertical depth?

Q. No; the area.

A. That is difficult to tell. The flood started to cut the [138] westerly bank beyond the limit of

(Testimony of Allen Shattuck.)

the Addition, and when it cut down the natural bank there and struck the flume, it naturally took the flume out and then spread out a distance of possibly two hundred feet in width there, between the easterly bulkhead and the bank that was left on the northwest, over toward the Northern Laundry Building.

Q. Well, the widest place was below where your bulkheads began—couldn't have been much above it.

A. No, the widest place was below where the bulkhead—

Q. (Interrupting.) And all that part of the bulkhead was taken out? A. Yes.

Q. You know what became of the logs?

A. Well, they washed away.

Q. You don't know whether they jack-knifed up there. They were all bolted together?

A. They were drift-bolted.

Q. Drift-bolted. You don't know whether they jack-knifed and threw the current over, deflecting over it here (indicating)?

A. You couldn't see that. There was too much water.

Q. There was too much water. You didn't observe the diverted water swirling to one side and cutting out the bank?

A. No, I didn't see that.

Q. You stated this morning that the flume is from, or was from thirty-five to forty-five feet wide? A. Thirty to forty feet.

(Testimony of Allen Shattuck.)

Q. Didn't you say thirty-five to forty-five feet, until you approached the lower end of it; then it was narrowed, you said, to twenty-six. A. Yes.

[139]

Q. Now, you stated a little while ago, that at a point here (indicating) almost directly at the west end of the tract of land marked "Light & Power Company's S. A. homestead claim," that was where the mouth of your flume was?

A. The westerly side of that.

Q. The westerly end, right here (indicating).

(Witness points out point on map.)

Q. Approximately right across that westerly end, the end of that tract.

A. The end of the tract. This is the westerly end (pointing).

Q. Oh, I thought this was it across here (indicating.)

A. It struck that tract near where C Street strikes it.

Q. Now, you described the debris that the flood collected near the, between the mouth of the flume and the mouth of the old channel here. A. Yes.

Q. You did not see any beyond that?

A. There is any of any consequence beyond that; some of the walk—

Q. (Interrupting.) Well, you didn't notice any debris collected up there? A. Just a little.

Q. Just a little. Nothing from the stream proper?

A. Well, there was something that the stream

(Testimony of Allen Shattuck.)

washed down there, above the sidewalk at that end of the Addition, but the greatest amount came down here (indicating).

Q. You were down there, you say, on that morning, the 26th of September?

A. I was down there about nine o'clock in the morning the first [140] time.

Q. Did you notice the time that your entire flume on this flat, for six or seven or eight hundred feet, was choked up? A. At that time.

Q. Did you notice when it was?

A. Well, it was choked up for some distance above Willoughby at the time I went out there in the afternoon.

Q. And kept filling?

A. No, after it was filled back a little ways, it went over in another direction.

Q. The flow of water to the sea was completely obstructed? A. I think so.

Q. And no stream could get through there?

A. No.

Q. And the only way that the water coming down the creek could escape was to flow over your flume where it was broken and seek its outlet down that way? A. Yes.

Q. That was all that happened? A. Yes.

Q. If your flume had had sufficient capacity to take care of the water and the debris, it wouldn't have choked that way and any debris coming down there wouldn't—

(Testimony of Allen Shattuck.)

Mr. FAULKNER.—I object to this question—argumentative, purely.

The COURT.—Yes.

Q. Well, you needn't answer that. Anybody can see that.

The COURT.—Objection sustained.

Q. When you built the flume first in 1914, you built the [141] bulkhead across what is marked as the "original channel" on Mr. Stewart's map and as shown up the main creek bed on Plaintiff's Exhibit "F"?

A. We didn't build it across any channel. We built it along the course part of the stream was taking at the time.

Q. You may put it that way. You did build the bulkhead, as shown in Plaintiff's Exhibit "A," between the alley in block 208 and down across Tenth Street, which Mr. Stewart testified is still there? A. Yes.

Q. You built it there? A. Yes.

Q. That was carried out?

A. I'll say that we built that originally. It was strengthened by the city.

Q. That was carried out in 1915, wasn't it?

A. That bulkhead?

Q. Yes. A. No.

Q. Part of the bulkhead was carried out in 1915?

A. No.

Q. Wasn't that strengthened some?

A. Some of the bulkhead here, on lot 8, block 213, that is where you probably mean. The water

(Testimony of Allen Shattuck.)

washed under there and caused a lot of the filling that we had put in under the rows of piles to disappear, and we strengthened that by putting slabs in there and by filling it again, but there was no part of the bulkhead went out.

Q. Well, that part of the bulkhead that I have referred to stood the storm of 1918, didn't it? [142]

A. It was there; it is there yet.

Q. Didn't go away? A. No.

Q. But the bulkhead on the opposite side, adjacent to Mr. Eikland's property, did go out?

A. Well, a part of the bulkhead across, on the opposite side, didn't; no.

Q. Yes. Well, a piece of it stood, but the bulkhead—

A. (Interrupting.) There's some of it here (indicating).

Q. But the bulkhead between the westerly side, or southerly side of lot ten in block 208, on down nearly across Tenth Street, did go out. A. Yes.

Q. Now, when did you people first agree to put that in? A. First determined to put it in?

Q. First determined to put it in; yes.

A. I don't know; I don't recall.

Q. You don't recall? A. No.

Q. Some time before it was put in, naturally?

A. Yes.

Q. And who planned it?

A. Well, it was planned by the owners of the

(Testimony of Allen Shattuck.)

Addition—Mr. Henry Shattuck, Mr. Casey and myself and this man Opsahl, who built it.

Q. You all planned it together?

A. That is my recollection.

Q. Mr. Casey superintended it, didn't he—the construction?

A. I am not sure about that, Mr. Cobb.

Q. Remember testifying to that on the former trial?

A. I was testifying to the manner that it was built in, but [143] I don't know what the actual arrangement was, whether Mr. Opsahl had final authority or Mr. Casey.

Q. Before the work was begun you had determined on its dimensions? A. Yes, sir.

Q. And the method of construction? A. Yes.

Q. You people determined that, didn't you?

A. I am not sure about that.

Q. Well, you had the privilege of determining it, didn't you? A. Yes.

Q. Well, don't you know that you did?

A. We probably did, but, as I say, I don't recall the actual conference on that point.

Q. Then after you got it planned, you got Mr. Opsahl to bid on it, or did you hire him by the day?

A. I think we hired him by the day.

Q. By the day? A. Yes.

Q. He was simply an employee, superintending other employees, then, was he?

A. I'm not sure about that.

Q. Mr. Shattuck, I hand you a photograph that

(Testimony of Allen Shattuck.)

is marked Plaintiff's Exhibit "D," taken in March, 1919, that's been introduced in evidence here, and ask you if you can tell what that represents?

A. That shows the town of Juneau and Gastineau Channel.

Q. How is that?

A. That shows the town of Juneau and Gastineau Channel, including the Casey-Shattuck Addition before the flood. [144]

Q. Now, will you step down here a moment. Shows it before the flood? A. Yes.

Q. Will you point out to the jury Mr. Eikland's house and the Ingman house that was carried out.

(Witness does so.)

Q. Where is the Ingman house?

A. It is farther upstream.

Q. Locate it, if you can. That is the Eikland house that you have pointed out? A. Yes.

The COURT.—Better mark it with a pencil.

Q. Now, then, is your flume shown on there?

A. Bulkhead channel; yes.

Q. Now, that picture was taken from some point on which side of Gold Creek, westerly or easterly? The town is over to your left.

A. I believe it was taken on the westerly side.

Q. Westerly side, looking down towards the channel, approximately in line with the course of the flume? A. Yes.

Q. Now, does that picture show the old original channel that is shown on the two maps to which you have testified? A. Yes.

(Testimony of Allen Shattuck.)

Q. Just point that out to the jury.

(Witness does so.)

Q. Now, the space that you have testified to as being filled with debris that was brought down by the water, is between the point where the old channel would naturally fall into the bay and the mouth of your channel? A. Yes. [145]

Q. Can you point out any old channel there, or low ground, between your bulkhead and Mr. Eikland's house?

A. Yes; this is low ground here (indicating).

Q. That little place right there?

A. No; the white ground to the left of the channel; left of the cribbed channel, looking downstream, is an old channel that flowed in behind Mr. Eikland's house.

Q. Flowed in behind Mr. Eikland's house?

A. Yes.

Q. Do you mean to the left, as you face that picture? A. No; to the right.

Q. To the right of it? A. Yes.

Q. Did it flow between Mr. Eikland's house and that little house shown at that point (indicating)?

A. No; it did not.

Q. Came back into the channel? A. Yes.

Q. And you built your bulkhead to cut off that little place? A. Yes.

Q. Left a little half-moon of low ground.

A. To the left of the channel?

Q. Yes. A. Yes.

Mr. COBB.—I'll offer this in evidence.

(Testimony of Allen Shattuck.)

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit "G.")

Q. I refer you now, Mr. Shattuck— Just step down here a moment. The jury couldn't understand your testimony up there. What exhibit is this?

Mr. FAULKNER.—Plaintiff's Exhibit No. 1.
[146]

Q. Here is the one I want to ask you about— Exhibit No. 5. That is the one you have testified to that showed all that was left of Mr. Eikland's house.

A. All that was left of Mr. Eikland's lot.

Q. And this piece of timber shown, extending to the left from that little piece of picket fence, that is about five feet, is it; that picket fence is about five feet long? A. I suppose so.

Q. That's on the extreme corner of his lot?

A. Yes.

Q. And that (indicating) represents the sidewalk that is left extending out over the washed-out channel? A. Yes.

Q. Now, I refer you to Plaintiff's Exhibit No. 1, being a photograph of the Casey-Shattuck Addition shortly after the flood and overlooking Gastineau Channel. Can you see the Ninth Street bridge across where your flume was, on there?

A. Ninth Street bridge is right in the vicinity of these two houses (indicating).

Q. There wasn't any bridge across what is shown

(Testimony of Allen Shattuck.)

there as the creek channel prior to the flood, was there? A. No response.

Q. On the approach to Ninth Street, to the bridge, there was a good street across there, at that time, wasn't there?

A. A street was built up there; yes.

Q. And at the time this was taken, water was running down the channel to the left of the bridge?

A. Water ran right behind Mr. Eikland's house.

Q. This picture shows that hospital building?

A. Yes. [147]

Q. Now, the water that you spoke about that was down under the hospital building, was largely coming down through here, wasn't it (indicating)?

A. No.

Q. Where was it coming from?

A. Coming through the course of the cribbed channel and after it got to Ninth Street, it left the course of the cribbed channel and took a course off directly toward the hospital.

Q. And the cribbed channel was blocked to the flow of water toward the sea?

A. It filled up and flowed in another direction.

Q. You remember there being a ball ground out there on the westerly side of the creek on the flats years ago? A. Yes; yes, sir.

Q. There was a foot bridge to get across Gold Creek, wasn't there?

A. There was two foot bridges across Gold Creek.

Q. There was two? A. Yes, sir.

(Testimony of Allen Shattuck.)

Q. Can you point out on this map where one of them was?

A. There was one of them right opposite the Alaska Light & Power Company.

Q. One down there (indicating)? A. Yes, sir.

Q. Where was the other one?

A. There was another one across what is marked as the original channel.

Q. That was a good long one?

A. They were both pretty good long ones.

Redirect Examination.

(By Mr. FAULKNER.) [148]

Q. Mr. Shattuck, on Defendant's Exhibit No. 2, there is shown a platform. Did you note *the* over that platform at the time of the flood?

A. No, I think not.

Q. Now, Mr. Cobb asked you about the cribbed channel opposite Mr. Eikland's lot, which would bring it into block 213. Do you know the nature of the ground along in where the cribbed channel crosses block 213, as to whether it was higher or lower than the other portion?

A. The ground behind that part of the cribbed channel is high, mostly.

Q. High ground there mostly.

Mr. COBB.—I didn't understand that question.

Mr. FAULKNER.—He said the ground behind it was high.

Mr. COBB.—The ground behind the cribbed channel?

Mr. FAULKNER.—Yes.

(Testimony of Allen Shattuck.)

Q. Now, how did the ground across the portion of the cribbed channel in block 213 compare with the height of the cribbing itself?

A. All the ground back of the cribbing that is shown on the west side of the cribbed channel, you mean?

Q. Yes.

A. The ground back of that is almost as high as the back of the cribbing for most of its length. On the opposite side, it's not as high.

Q. On that side (indicating)? A. Yes.

Q. On the other side it was high? A. Yes.

Q. As high as the top of the cribbing? [149]

A. Yes.

Q. Now, Mr. Shattuck, at the time that you built the cribbed channel there or the bulkheads, who owned the property?

Mr. COBB.—That is admitted on the pleadings.

Mr. FAULKNER.—No; it isn't.

Q. Who owned the property? Beg your pardon, Mr. Cobb, I don't think so.

Mr. COBB.—All right.

Q. Who owned the property in the tract?

A. Mr. Casey, Henry Shattuck and I owned the greater part of it.

Q. You mean by the greater part of it, the most of it? A. Yes.

Q. Now, had some of it been sold at that time?

A. Yes.

Q. On what conditions?

(Testimony of Allen Shattuck.)

Mr. COBB.—We object to that as irrelevant and immaterial what conditions it was sold on.

Mr. FAULKNER.—If the Court please, I'll state that the purpose of it is to show how the bulkhead was constructed. The question as to the construction of the bulkhead, as to how they constructed it, what care they had used and so on would depend on what their risk was, whether they had anything at stake there. I think for that purpose it is very material.

The COURT.—In this case?

Mr. FAULKNER.—Yes.

Mr. COBB.—They state that they owned the bulkhead that ran through that property. They sold some of it to somebody else. Now, what conditions they sold it on to somebody else is immaterial. [150]

The COURT.—Yes, I think it is immaterial.

Mr. FAULKNER.—I want to show that they still had an interest in it.

Mr. COBB.—You had a lot of interest in it.

The COURT.—Objection sustained.

Mr. FAULKNER.—We'll ask an exception.

Q. Now, Mr. Shattuck, you say you still owned the most of it, then? A. Yes.

Q. Now, on the portion of the plat, Plaintiff's Exhibit "A," which is marked "original channel," was there any of that ever sold—any of this tract in the original channel?

A. There was none of it sold up to the time of the flood.

(Testimony of Allen Shattuck.)

Q. Was there any of it ever sold?

A. Not until recently.

Q. I will ask you this question: Was any structure ever built in there?

Mr. COBB.—Prior to the flood?

Mr. FAULKNER.—No; any time.

Mr. COBB.—No; we object to “any time.”

Q. Well, all right; prior to the flood.

The COURT.—Objection sustained as to any time.

A. No. You mean in the bed or part of the ground that is shown as the original channel?

Q. Within the original channel; within the limits shown as the original channel?

A. No; not out to Willoughby Avenue.

Mr. FAULKNER.—I think that’s all.

Recross-examination.

(By Mr. COBB.) [151]

Q. Mr. Shattuck, I don’t know whether I understood you or not. Did you tell the jury that beyond, on the westerly side—

Mr. FAULKNER.—Pardon me, Mr. Cobb. Mr. Casey has suggested just another question. I’ll be through in a moment.

Q. (By Mr. FAULKNER.) Do you know whether Mr. Henry Shattuck owned; personally owned any property down on the bank, or in the vicinity, of the cribbed channel, in block 213?

A. Yes; he owned a house and lot there.

Q. Which lot is that?

A. I believe it is lot 7, block 213.

(Testimony of Allen Shattuck.)

Q. Was that at the time the cribbed channel was built? A. Yes.

Q. A house and lot? A. Yes.

(By Mr. COBB.)

Q. Now, referring to the map made by Mr. Stewart in this case— I don't know the number of it— did I understand you to state that where the cribbed channel there crossed block 204 and block 208, that the west side, the banks on the west side are higher than they are on the east?

A. 204, did you say?

Q. Across 204 and 208—that the banks along there are higher than they are—

A. (Interrupting.) The cribbed channel, as shown on Plaintiff's Exhibit "A" here, on the westerly side, is still intact. It wasn't taken out by the flood. The ground immediately behind it, the greater part of that was practically as high as the top of the cribbed channel.

Q. Yes. Well, I understood you to say—I must be mistaken—that from that point on the map, showing the northerly end of the cribbed channel still intact, from there on up, the [152] west banks were higher than the east banks.

A. No; I didn't testify to that.

Q. The east banks were considerably higher, were they not?

A. There isn't much difference in the elevation of the ground back there, on the east and the west side.

Q. Isn't the east side higher?

(Testimony of Allen Shattuck.)

A. It might be a few feet higher on the east side, on 204 than it is in 208.

Q. Higher than 209?

A. No; the slope of the creek was quite heavy.

Q. I'm not talking about the slope of the creek. I'm talking about the ground on the east side of the bank.

A. All right. The slope of the ground from the west side of the corner of 204 to a point opposite plaintiff's lot sloped quite materially. There is no part of the Addition that slopes any more rapidly than the ground in there.

Q. That isn't the question. I'm asking you whether the east side, on the east side the banks along where Mr. Eikland's house was, isn't considerably higher than the westerly side, opposite the creek bank? A. No.

Q. All right. You may let it stand at that. Do you recall that picture?

The COURT.—Well, now, never mind arguing it.

Testimony of Charles Goldstein, for Defendants.

CHARLES GOLDSTEIN, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name? [153]

A. Charles Goldstein.

(Testimony of Charles Goldstein.)

Q. Where do you live? A. Juneau.

Q. How long have you lived in Juneau?

A. Off and on for about thirty-seven years.

Q. Were you in Juneau on the 26th of September, 1918? A. I was.

Q. Were you here when this case was tried in March, 1919? A. I don't think I was.

Q. Where were you on the 26th of September, 1918, at the time of the flood?

A. I was out at the flood.

Q. In the Casey-Shattuck Addition?

A. Yes, sir.

Q. You observed conditions out there that day?

A. Yes; to a certain extent.

Q. Now, did you observe the rainfall that day?

A. Yes.

Q. From your observations, had you ever experienced a greater rainfall in Juneau than there was that day? A. I don't think so.

Q. How did that compare with any other period, any other day of heavy rain within your memory?

A. Well, that I couldn't say. I know there was a very heavy rainfall.

Q. Was it greater than any other period?

A. I couldn't say that either.

Q. Did you observe the flood waters in the creek that day? A. I did.

Q. Did you ever see anything as high as that before? [154] A. No, sir.

Cross-examination.

(By Mr. COBB.)

Q. You never had seen any flood there, particu-

(Testimony of Charles Goldstein.)

larly high flood, since the construction of this flume, had you? A. I can't say that I did.

Q. How's that? A. I can't say that I did.

Q. You don't think you did? A. No, sir.

Q. You simply say that when you went out and saw the conditions, when you got there, water was being confined, to a certain extent, by the flume, wasn't it?

A. Well, I couldn't say it was confined. It was covered up and the water was running clear over the whole flats.

Q. What time of the day was that, Mr. Goldstein?

A. Well, I was there for four or five hours.

Q. What time did you go out?

A. To the best of my recollection, it was about noon time.

Q. About noon time? A. Yes, sir.

Q. Water was then going over the flume and through it?

A. Well, I couldn't say anything about the flume, because I didn't get up that far.

Q. You didn't get up that far? A. No, sir.

Q. You were down at the lower end?

A. I was down where Eikland's house is.

Q. Uh—huh.

A. Not Eikland's, but, what's his name? The carpenter who [155] had a little house there—worked for the Alaska-Juneau.

The COURT.—Ingman?

(Testimony of Charles Goldstein.)

A. Yes; the Ingman house.

Q. You know when that went out?

A. It didn't go out. My recollection of it is that the Ingman house stood right on the bank. We were out there helping a lot of people to move that were moving.

Q. Were you there when Eikland's house went out?

A. I couldn't say whether it was Eikland's house or not. I saw a house coming down the stream.

Q. You are an old-timer here and have observed rainfalls, and so on. I'll ask you if it isn't a fact that you hunt a great deal out in the mountains, or not? A. Yes.

Q. Pretty familiar with weather conditions consequently? A. Yes, sir.

Q. Isn't it a fact that in regard to high waters in the streams there are two elements enter into it, or may enter into it. One is the amount of rainfall and the other is the amount of fresh snow that may be melted by the rain?

A. Certainly; could do it, alright enough.

Q. Sometimes a lesser rainfall might produce greater floods in the streams, if it should happen that up at the head of the streams in the mountains, is some fresh snow?

A. Well, it takes a pretty good fall of rain to raise a creek to the height that one was.

Q. What I am asking you, Mr. Goldstein, is whether you haven't observed that wherever there is fresh snow in the mountains in the fall of the

(Testimony of Charles Goldstein.)

year and a warm rain comes with it, the floods or streams are considerably higher than they would be [156] from rains alone?

A. Naturally would.

Q. And you have observed that as an actual fact, haven't you? A. Yes.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Did you observe the damage that was done in Juneau generally that day?

Mr. COBB.—That's not proper redirect examination.

Mr. FAULKNER.—Well, I'll ask permission to ask it.

Mr. COBB.—Well, that's all right.

Q. Did you observe the other damage that was done in Juneau that day? A. Yes, sir.

Q. Where was that?

A. Back of the Gastineau Hotel, for instance, was one of them.

Q. What happened there?

A. A slide came down there and demolished those houses and ran down that—

Q. (Interrupting.) How many houses?

A. I think there was two or three.

Q. Do you know how old those houses were, how long they had been there?

A. One of those houses was there quite a long while. Williamson's house was there, I should judge twelve or fifteen years or more.

(Testimony of Charles Goldstein.)

Q. Now, Mr. Cobb asked you if you observed the flume and you said you didn't go up far enough to observe the flume. Now, which flume did you mean? A. I mean the flume at the bridge.

Q. Which bridge? [157]

A. Gold Creek bridge.

Q. You didn't refer to the cribbed channel or bulkhead?

A. No, sir; I didn't say that at all.

Q. Water was over that? A. In places it was.

Recross-examination.

(By Mr. COBB.)

Q. Mr. Goldstein, every few years since you have been here, ever since there have been any buildings on what we call "Swede Hill," there has been more or less slides and damage?

A. There has been some.

Q. That's not uncommon at all. A. No.

Q. Nor slides along the roads leading up to the mountains? A. No, sir.

Q. Now, which houses—do you refer to the houses that went down over which lawsuits were tried against the Alaska-Juneau Company?

A. No, sir.

Q. That wasn't the time?

A. That was later on.

Q. That's what I thought.

Testimony of W. Layton, for Defendants.

W. LAYTON, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Layton, will you state your name?

A. W. Layton.

Q. Where do you live, Mr. Layton? [158]

A. Juneau.

Q. How long have you lived here?

A. Since 1889.

Q. In what part of town do you live?

A. Lower Front Street.

Q. Were you here on September 26, 1918?

A. Yes.

Q. Where were you on that day, Mr. Layton?

A. Well, up to about eleven o'clock I stayed down there.

Q. Down home?

A. Down home there, fixing the flumes there, and about eleven I think; between eleven and twelve, I went over to the flats.

Q. What did you observe out there when you went out there?

A. Well, the overflow of the creek.

Q. Where did you go—to what point?

A. Went out on Willoughby Avenue and from there up to the laundry, the Northern laundry.

(Testimony of W. Layton.)

Q. Across Gold Creek bridge?

A. Yes, I crossed Gold Creek bridge.

Q. About what time did you cross there?

A. I should judge it was pretty close to twelve o'clock.

Q. Did you see how high the water was there at the bridge? A. Yes.

Q. At that time? A. Yes.

Q. How high was it?

A. Well, it was pretty well up. Exactly the height, I couldn't tell you.

Q. How close was it to the bridge then—pretty close?

A. It was pretty well up, but exactly how high I couldn't tell you. [159]

Q. Did you come back across the creek again?

A. Yes.

Q. What happened to that bridge that day?

A. The bridge got washed out.

Q. Where did you go; what did you do after that?

A. Came back in; went back home again.

Q. Did you go down to the native hospital?

A. No.

Q. Did you go down by Mr. Eikland's house?

A. No closer than the Northern Laundry. I could look across where they were.

Q. What happened to the laundry building?

A. Water was terribly high, rolling boulders in the creek, and so on.

(Testimony of W. Layton.)

Q. Did you observe anything come down the creek?

A. Yes; there was lots of timber, stumps, and so on.

Q. Was some of the water coming over the bank?

A. It struck pretty hard there at the turn.

Q. What did it do to the bank?

A. Washed away the bank there considerable. At that time it was up about level with the bank.

Q. Rushing over by the houses there, surrounding any of the houses?

A. Not right at the laundry, I didn't notice that. It struck that bank there and kind of turned and went in another direction.

Q. Now, Mr. Layton, did you observe any damage that was done by that flood out there that day?

A. Yes; there were two or three buildings washed away, between there and the bridge. [160]

Q. Were you out there the day after the flood?

A. No.

Q. Did you observe any damage done anywhere else in town that day? A. At the Gastineau.

Q. What was done there?

A. Two or three buildings there laying above the Gastineau upside down.

Q. Fell down? A. Yes.

Q. Did you see any stream of water coming down in that vicinity?

A. Yes; we were there cleaning up in the Gastineau.

Q. Water came through into the hotel?

(Testimony of W. Layton.)

A. Yes, and out into the street.

Q. Did you observe any damage, any high water at any other point further down? A. Yes.

Q. What was there?

A. Mud right across the street, about.

Q. Down about in the vicinity of your house?

A. Well, right where I am living; yes. The flumes there was all overflowed.

Q. And further down, where the Alaska-Juneau property is, did you observe anything there?

A. Yes; there was a slide there.

Q. Did you observe the rainfall that day, Mr. Layton? A. Yes.

Q. Now, in your experience, in the time that you have lived in Juneau, have you ever observed a greater rainfall than there was on that day? [161]

A. No, sir.

Q. Did you ever see such high water in Gold Creek as there was on that day? A. No, sir.

Cross-examination.

(By Mr. COBB.)

Q. Have you seen all the high waters that have been in Gold Creek since you have been up here?

A. No; I never took much notice of Gold Creek myself.

Q. You don't think you ever saw it rain quite so hard? A. No.

Q. Since you have been up here? A. No.

Q. It is no uncommon thing, since they have been building on the side of the mountain called Swede

(Testimony of W. Layton.)

Hill, steep mountainside, for some of the houses to slide at times? A. Yes.

Q. They do it here every year.

A. No; not exactly every year.

Q. But every time there is a heavy rain?

A. Once in a while when there is a heavy rain.

Q. Yes, once in a while. Been doing that for years? A. Doing it for quite a while back.

Q. For the purpose of the record, I guess the jury all know that what is referred to here in the testimony as Swede Hill, where these houses are said to have slid down that day, is a very steep hill—almost as steep as it is possible to build on, isn't it?

A. It is.

Redirect Examination.

(By Mr. FAULKNER.) [162]

Q. You say you have seen slides before. Did you ever see as many slides *slides* or as much water come down the hills as there was that day?

A. No, sir.

Testimony of Susie Michaelson, for Defendants.

SUSIE MICHAELSON, called as a witness for the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified through an interpreter, who was duly sworn to correctly interpret the Indian into the English language, as follows:

(Testimony of Susie Michaelson.)

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you state your name?

A. Mrs. Michaleson.

Q. Mrs. Michaleson, where do you live?

A. In Juneau; down below the courthouse here.

Q. How long have you lived in Juneau?

A. A long time.

Q. How old are you? A. Fifty years old.

Q. Where were you born? A. Here in Juneau.

Q. Whereabouts?

A. I was born down in the locality where Charley Goldstein's building is. We had a house there and a garden there.

Q. You know where Gold Creek is? A. Yes.

Q. Did you ever live out in that vicinity out there?

A. Yes, we used to have a smokehouse there, a fish house.

Q. Where was that fish house?

A. Where the native hospital is.

Q. Now, how old were you when you had the smokehouse there? How long ago was that? [163]

A. It was about as long as I can remember.

Q. Do you know where Gold Creek was when you had the smokehouse there, where the creek went.

Mr. COBB.—I think I shall object to that testimony as irrelevant and immaterial. It doesn't make any difference where Gold Creek went, according to this witness' testimony. She is fifty

(Testimony of Susie Michaelson.)

years old and they had that smokehouse there as far back as she can remember. It must have been forty years ago. I don't see how it can throw any light upon this.

The COURT.—Simply preliminary?

Mr. FAULKNER.—The purpose is to show the tendency of the creek to—

The COURT.—Yes, I understand. Objection overruled.

(Question repeated by reporter.)

A. The creek ran into a kind of fork. Our smokehouse was in between. The creek that ran on the other side was smaller than the creek that ran on this side. The creek that ran on this side of our smokehouse was the main creek that we caught our salmon in.

Q. That is, this side nearest to Juneau?

A. That was the largest creek.

Q. Now, were you in Juneau on September 26, 1918, when we had the flood in Gold Creek?

A. Yes.

Q. Where were you on that day?

A. I was at my home.

Q. Did you go anywhere? Did you go anywhere from your home?

A. I made two attempts to go down there on the flat and I got frightened back. I wanted to try to go down to where my boy's home is. [164]

Q. Where is your boy's home?

A. Down on the flats.

Q. What frightened her back?

(Testimony of Susie Michaelson.)

A. Water was rising and it was too high. I was afraid to take any chances.

Q. Could you get over to his home? A. No.

Q. What kept her from getting there?

Q. Water raised too high.

Q. Do you know where that home was, what street it was on? The question is whether she knows or not—the name of the street.

A. I don't know the name of the street.

Q. Now, Mrs. Michaelson, did you ever see as much water in Gold Creek before as there was that day? A. No.

Q. Did you ever see as much rain as there was that day? A. No.

Cross-examination.

(By Mr. COBB.)

Q. Did you go out to Gold Creek that day?

A. I went out there twice.

Q. Whereabouts on Gold Creek?

A. On this side, down at the mouth.

Q. Down on Willoughby Avenue?

A. Yes; on this side.

Q. Couldn't you cross the creek on Willoughby Avenue? A. No.

Q. What was the reason you couldn't cross Gold Creek on Willoughby Avenue? [165]

A. Water was too high.

Q. Was the water of Gold Creek running over Willoughby Avenue? A. I didn't get you.

(Testimony of Susie Michaelson.)

Q. Was the water of Gold Creek flowing over Willoughby Avenue?

A. Down on the lower part, on the flats, water was running right over the street, right over the ground, over the sidewalks.

Q. Ask her if it was running over Willoughby Avenue. She said she couldn't cross on Willoughby Avenue. Ask her if the water from Gold Creek was running over Willoughby Avenue.

A. I don't understand you.

Mr. FAULKNER.—I suggest that Mr. Cobb confine it to a certain point. She has testified at what point it was. If you will ask her what point she means—

Mr. COBB.—Any point.

The COURT.—Ask her what she means by Willoughby Avenue. I think she is entitled to know that?

Q. You know Willoughby Avenue? A. No.

Q. Doesn't know Willoughby Avenue. She says she doesn't know Willoughby Avenue?

A. She said "No."

Q. How did you try to get across Gold Creek, whereabouts did you try to get across Gold Creek to get to that house?

A. Where there is a bridge going across.

Q. How is that?

A. On the lower side where the bridge crosses. I came to this side where the crowd was.

Q. Power-house was.

Mr. WICKERSHAM.—Where the crowd was.

(Testimony of Susie Michaelson.)

Q. Oh, where the crowd was? [166]

A. Yes.

Q. Was that down next to the salt water?

A. You know the place where the bridge crosses, down on the continuation of Willoughby Avenue? She didn't say Willoughby Avenue, but that is what she means.

Q. Was that where she tried to cross?

A. Yes.

Q. You tried twice to get across there and you couldn't on account of the high water?

A. I went down there the first time with my shoes and got my feet wet and I returned home and put on my gum boots and I tried again.

Q. Is that the place where the bridge has been built in the last year or two—the last two or three years?

The COURT.—Just ask her that. Is that the place where the bridge has been built?

INTERPRETER.—That is what I am trying to ask her, Judge.

A. I don't understand what you mean. There's several bridges crossing there. They were all flooded along down there on the flats.

The COURT.—Let me ask her a question or two. Ask her if she knows where the Home Grocery is?

A. Yes.

The COURT.—When she went to see her son that day, did she go by the Home Grocery?

A. It was at that point that I turned back.

Q. Ask her if she has seen Gold Creek at all times

(Testimony of Susie Michaelson.)

that it happened to be high water since she has been here? A. Yes.

Q. Every time there has been flood waters, she has gone out to [167] Gold Creek to look at it?

A. Well, I was raised on the banks of the creek. We got our water from there and I observed it all the time I lived there.

Q. She has been in Juneau constantly since she was born here? Ever been away?

A. I never went away from this part at no time.

Q. Never left Juneau at all. Never been to Sitka? A. No.

Q. Never been to Haines? A. No.

Q. Never been down to Sheep Creek?

A. Never saw Haines.

Q. How? A. Never saw Haines.

Q. Never been down to Sheep Creek?

A. Oh, yes; that is, went down there is a rowboat.

Q. Ever been up to Auk Bay?

A. We would go up there in the summer-time; after berries or whatever we wanted.

Q. How many times have you seen high water in Gold Creek?

A. I have noticed Gold Creek raise, but I have never seen—I never saw the water raise so high any other time.

Q. Now ask her if she can remember how many times she saw high water.

A. I couldn't—I never kept track of how many times. It never entered my mind.

Q. Ask her if she has ever seen water there go

(Testimony of Susie Michaelson.)

all over the flats. Ask her if before this September, 1918 flood, she ever saw water all over those flats out there? [168] A. No.

Q. Never saw water all over, at all? A. No.

Q. It was always running in the channel. Ask her if she always saw the water running in the channel? A. Yes; just in the main channel.

Q. In the main channel. Never saw the waters so high that they spread out away from the main channel, or an overflow?

A. Yes, I have seen it go over the banks of the creek, run over the banks of the creek, but I never seen it flow as it did that time that you are talking about, 1918.

Testimony of Mary Johnson, for Defendants.

MARY JOHNSON, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified through an interpreter sworn to interpret Indian into English, as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. What is your name? A. In Indian?

Q. No; in English. A. Mary.

Q. Mary what? A. Johnson.

Q. How old are you, Mrs. Johnson?

A. Sixty years old.

Q. Where do you live? A. Here.

(Testimony of Mary Johnson.)

Q. In Juneau? A. Yes, in Juneau.

Q. How long have you lived in Juneau? [169]

A. I was born here; here in Juneau.

Q. Do you know where Gold Creek was?

A. Yes.

Q. Did you ever live near Gold Creek?

A. No.

Q. Did you ever live out here on the flats?

A. Yes.

Q. Where did you live when you were a little girl? A. Here in Juneau.

Q. Whereabouts?

A. I used to stay here in the smokehouse, curing salmon, when I was a little girl here.

Q. Where was the smokehouse?

A. About where the native hospital is.

Q. Who owned that smokehouse?

A. It belonged to our family.

Q. Now, did you see the creek out there by the smokehouse? A. Yes.

Q. Which way did the creek go by the smokehouse?

A. On like an island where our smokehouse was. The creek branched above, up above, a ways above our house and ran the other way and it also ran this way, and the main stream was on this side of our smokehouse and we secured our salmon out of the main stream.

Q. Now, Mrs. Johnson, were you in Juneau at the time of the big flood in September, 1918?

A. No.

(Testimony of Mary Johnson.)

Q. Where were you on that day?

A. I was up at the bar that day.

Mr. FAULKNER.—That's all. [170]

Mr. FAULKNER.—If the Court please, I offer in evidence a certified copy of the weather records from the Department of Agriculture, which are certified to by the Department of Agriculture, showing the rain in Juneau from July, 1909—highest periods of rain, from July 1909, to September 26, 1918.

Mr. COBB.—Well, I don't—

Mr. FAULKNER.—I think under a section—whatever it is—it is admissible, of the Revised Statutes.

Mr. COBB.—No; that wasn't the point at all. I think the period is entirely too short to be of any value. It only covers a period of nine years.

The COURT.—Well, it may be received for what it is worth.

(Whereupon said document was received in evidence and marked Defendant's Exhibit No. —.)

Mr. FAULKNER.—I'll read this to the jury.

Mr. COBB.—They probably couldn't remember it. You can read it in the argument.

Mr. FAULKNER.—This is a certified copy of the weather records made by the Department of Agriculture at Washington, D. C., showing the greatest precipitation in twenty-four hour periods for the years 1909 to 1918, twenty to twenty-four hour period. In 1909, on July 27th, the highest period was 1.42; in 1910, the highest period in

(Testimony of W. W. Casey.)

twenty-four hours, was .95; in 1911 the highest period was on December 2, 1.72; in 1912, on February 22, 3.50; in 1913, October, 3.50; in 1914, on February 14, 2.40; 1915 was on September 28, 1.82; in 1916, it was on July 29, 1.78; in 1917, it was Sept. 17, 2.12; in 1918, September 25th and 6th, 5.54. [171]

Testimony of W. W. Casey, for Defendants.

W. W. CASEY, one of the defendants herein, called as a witness on their behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. You are one of the defendants in this action?

A. Yes, sir.

Q. And you own an interest in the tract mentioned that is in controversy here?

A. Yes, sir.

Q. What interest do you own?

A. One-half.

Q. There is one thing I want to call your attention to that is a little bit out of order. I'll hand you Plaintiff's Exhibit "G," and ask you to look at the cribbed channel shown on that photograph, and I call your attention to this area over here (indicating). What is that that I have pointed to?

The COURT.—On the right-hand side?

Mr. FAULKNER.—On the right-hand side of the cribbed channel.

(Testimony of W. W. Casey.)

The COURT.—On the right-hand side of the picture.

Mr. FAULKNER.—Yes; on the right-hand side of the picture.

A. That's a place where water once ran.

Q. Well, at the time the cribbed channel was built, was there any water running there?

A. No, sir.

The COURT.—You'll have to speak louder.

The WITNESS.—No, sir.

Q. That there was an old creek-bed?

A. An old creek-bed.

Q. Now, Mr. Casey, how long have you been interested in this [172] tract of land?

A. Since 1913.

Q. Where do you live? Where do you live now?

A. Beg pardon?

Q. Where do you live now?

A. Down on Tenth Street, in block 214.

Q. On the tract of land in question?

A. Yes, sir.

Q. How long have you lived there?

A. About five years, I think.

Q. Are you familiar with this tract of land?

A. Yes, sir.

Q. How long have you been familiar with it?

A. Well, practically since I bought an interest in it.

Q. Ever since you bought it? A. Yes.

Q. You were familiar with the course the water took in coming out of Gold Creek canyon?

(Testimony of W. W. Casey.)

A. Yes, sir.

Q. During those years? A. Yes, sir.

Q. How long have you lived in Juneau?

A. Since the spring of 1898.

Q. What did you use this land for, prior to 1912?

A. Pasture land.

Q. Pasture lands? A. Yes.

Q. You yourself used it? A. Yes, sir.

Q. Have you been over it during that period?

[173]

A. Yes, sir.

Q. Now, in 1912, what did you do with it with reference to a survey? A. We had it surveyed.

Q. Who made the survey?

A. Mr. Hill and Mr. Wettrick and others.

Q. Now, at that time, or up to the time of that survey, where did Gold Creek flow? Show that on Plaintiff's Exhibit "A." Show to the jury where the creek flowed up to the time of the official survey. Take this (handing exhibit to witness) so they can all see. This is Gold Creek bridge.

A. The creek came out of the canyon here and flowed down here, to some point in between the point of Ninth and Tenth Streets. There was a division of the creek there. Part of it went that way and the rest of it came this way (showing).

Q. Where did the main body go?

A. Some years pretty nearly all of it went on the east side.

Q. On the east side?

(Testimony of W. W. Casey.)

A. And some years, 1911, 1912, a good deal of it went on the west side.

Q. What happened to the westerly part of it, or what is marked as the original channel, in 1913?

A. We had a wing dam in at some place between Ninth and Tenth for the protection of the Pacific Coast dock.

Q. Where was the Pacific Coast dock?

A. Down here (pointing).

Q. Which direction from the plat?

A. Down here (indicating).

Q. At the foot of this street (indicating Main Street). [174]

A. And the ships had a good deal of trouble. They would go aground at low tide, and we put in a wing dam to make it go the other way. Now, in this particular year, we had quite a little freshet and the ground, and so forth, came down there as it did from the basin and struck the wing dam and went into that pool and nearly filled it.

Q. What was being done up in the basin at that time? A. A lot of placer mining, quartz mining.

Q. Was there any particular activity up there?

A. The Perseverance was doing a good deal of work and the Alaska-Juneau was running.

Q. Where is the lowest part of the tract?

A. Right here (indicating).

Q. Which corner would that be?

A. This would be the southeastern corner.

Q. Southeast corner? A. At that time.

Q. Yes. Now, there is marked on this way, Plaintiff's Exhibit "A," a section marked "the old

(Testimony of W. W. Casey.)

channel." Will you describe what is in that at the present time.

A. Well, water may have run there at some time, but not to my recollection, to amount to anything. There is grass, quite good-sized trees. This is all grass in here (pointing), with trees over it, and this in here (pointing); houses over here.

Q. Is there any creek there at all at what is marked on this, what might appear to be the intersection of an old channel with what they marked "the original channel"? A. No.

Q. It's solid ground? [175] A. Yes, sir.

Q. Anything growing on it?

A. Trees and grass.

Q. Now, is there anything growing up here, in what is marked the original channel?

A. Small trees.

Q. What kind of trees?

A. Willows, I think; small trees.

Q. At the time you built the wing dam, you say that was for the purpose of deflecting the water over to the westward? A. To the westward.

Q. To keep it away from the easterly bank?

A. To keep it away from the electric light company and the Pacific Coast dock. We were paid for the work.

Q. Did you at any time during those years, do any work anywhere else in that vicinity or in that section with a cribbed channel?

A. We did quite a little work just back of the electric light company and below that.

(Testimony of W. W. Casey.)

Q. Where would the electric light company's plant be on that plat?

A. Supposed to be in here some place (indicating).

Q. Yes.

A. We put in a lot of brush there and allowed the water to run over it and accumulate the sediment that came down from the mines.

Q. Who paid for that work?

A. The electric light company.

Q. Now, who else had property down there, if you know? Any other man have property in that vicinity whose property was [176] affected?

A. Oh, Donaher; yes.

Q. Mike Donaher? A. Mike Donaher; yes.

Q. Now, do you recall who did any of that work at that time?

A. Gus Anderson did the brush work. I am not sure who did the other work. I know he had some one working there, but I don't recall.

Q. Where is Gus Anderson now?

A. He is living here.

Q. In Juneau. Now, Mr. Casey, after you had this platted, what did you do with it?

A. In 1913?

Q. Yes. A. Put it on the market.

Q. Did you sell some of it?

A. Had it for sale.

Q. Now, you say you platted it and put it on the market? A. Yes, sir.

Q. Now, did you sell some of it? A. Yes, sir.

(Testimony of W. W. Casey.)

Q. Now, in 1914, what, if anything, did you do out there? A. Built a flume.

Q. Was it a flume, or was it— Was there a flume there?

A. Cribbed the creek, put cribbing on each side—

Q. As a matter of fact, there wasn't any flume there at all?

A. No; there was a cribbing on each side.

Q. Now, you say you built that in 1914?

A. Yes; the winter of 1914.

Q. Now, I forgot to ask Mr. Shattuck—when was Willoughby Avenue [177] constructed, before that or afterward?

A. The following summer.

Q. Now, you built the cribbed channel. Where did you build that?

A. We commenced at the lower end of the tract, or near, on Seventh Street; about probably fifty feet this side of the hospital, at the bottom, at the lower end of the creek, and built up on each side of the creek.

Q. Where was the creek flowing at that time?

A. Right in the middle— We built at the lower place, where the creek was, straight up from the bottom.

Q. You built that along the banks where the creek was?

A. Commencing at the bottom, at the lower end—the seaward side.

Q. Did you bring in some material there to build the bulkhead? A. Brought it all in.

(Testimony of W. W. Casey.)

Q. What did you bring in?

A. By water. Logs or piling, ranging from about sixty feet to some as long as 110 feet.

Q. 110 feet. How did you get those in?

A. We floated them in on the tides, a little this side of the hospital, right out to the piling.

Q. Right into the mouth of the creek?

A. Right into the mouth of the creek and hauled them up through the center, through the water, up the creek.

Q. Why did you bring them in there?

A. It was the lowest place you could carry them by water.

Q. Carried them in there by water? A. Yes.

Q. And built the bulkheads up along the banks of the stream? [178] A. Yes, sir.

Q. Now, how far up did you build those? I mean, how far up toward Gold Creek bridge?

A. A distance of about twelve hundred feet.

Q. Twelve hundred feet?

A. Very close to that.

Q. Who did that work?

A. A man by the name of Opsahl, assisted by others who did a good deal of the shoveling.

Q. Did you do some of the work yourself?

A. I was there pretty nearly all the time.

Q. Did you have some men there? A. Yes, sir.

Q. Who was Opsahl?

A. He was an old-time miner, who used to mine in Montana. He and I and a fellow by the name of Peterson, did a little mining up in the Porcupine

(Testimony of W. W. Casey.)

country the summer before—two or three summers before. We tried to, rather.

Q. Did he do any construction work?

A. Yes; we built a little flume up there to carry a little water down.

Q. Was he experienced in that kind of work?

A. Yes, sir.

Q. Before he came to Alaska, where had he been?

A. Working in mines. He was a placer miner.

Q. Where did he live here in Juneau?

A. Down on the bank, in block number—he lived in block No. 208. He owned those lots right there (pointing).

Q. Where is he now?

A. I don't know. [179]

Q. When did he leave here? About when did he leave here, do you remember?

A. Well, I couldn't say that. It might have been a year; it might have been two years.

Q. Did he go before these suits were brought?

A. Oh, yes; I think he did. I don't remember his being here.

Q. You have never seen him since?

A. He went back to Montana; that is, he said he was going to Montana.

Whereupon Court adjourned until 10 o'clock A. M., Nov. 15, 1922.

Wednesday, November 15, 1922, 10 o'clock A. M.
Court met pursuant to adjournment.

W. W. CASEY (on witness-stand).

(Testimony of W. W. Casey.)

Direct Examination (Resumed).

(By Mr. FAULKNER.)

Q. Mr. Casey, you stated that you built your bulkheads in the winter of 1914? A. Yes, sir.

Q. Now, will you describe to the jury the manner of construction of the bulkheads in question, on the banks of the stream?

A. We dug a trench, or two, as the case would be, down to a depth—it depended on the ground—some ground was a little bit higher than others. In one place we would have to go down three, four or five feet, and in other places, you wouldn't have to go down more than two and a half or three feet. We put in a long log— We shoveled the snow out and dirt and then put in a log and then put in a log on the other side, to make the cribbing. Put it in so that there [180] would be two logs run parallel; then we put in short pieces, put them across and put another log on top, and then took brush and rocks and filled these spaces in put in quite a good deal of brush and filled it with rocks.

Q. How did you fasten the cross-pieces?

A. We drift-bolted them with long drift bolts, sixteen to 18 inches long.

Q. What was the nature of the cross-pieces? What did they consist of?

A. The same as these others. They were piling.

Q. What was the length of the piling on the sides?

A. The piling that we got averaged from sixty to

(Testimony of W. W. Casey.)

110 feet in length. They ran from sixty to 110 feet.

Q. About what size approximately?

A. Probably on the top, the very long piles, were from ten to twelve inches, and the shorter piles would be about the same. We had piles there that were not to be over such a size at the butt and such a size at the top.

Q. You dug those trenches on both sides of the creek? A. Beg pardon?

Q. You dug those trenches on both sides of the creek?

A. Both sides of the creek; yes, sir.

Q. About how wide was the bulkhead?

A. Average through about five feet.

Q. What was the width, the distance between the two bulkheads between the two banks of the stream?

A. Between thirty, forty feet.

Q. At the lower end, down toward the sea, how was it constructed?

A. At the lower end we drove piles and lined them with three-inch lumber. [181]

Q. You say these bulkheads were built on the banks of the creek?

A. Right on the banks of the creek.

Q. The creek was running in there at the time?

A. Yes, sir.

Q. This has been referred to several times as a flume. I want you to describe that to the jury. Was it a flume or not?

(Testimony of W. W. Casey.)

A. Not a flume; it was just a cribbing on each side of the creek.

Q. And at the lower end of it was the channel narrower or wider than it was at the upper end?

A. Narrower.

Q. Why was that?

A. To keep the bottom clear.

Q. Clear of what? What was down there?

A. The sand, light gravel, light rocks and anything that would come through there. It was deeper and narrower.

Q. Deeper and narrower.

A. At the lower end, probably—at the lower end of my barn, it would probably be about twelve feet deep; that is, it was planked at that time.

Q. You say it was planked on the inside, at the lower end?

A. Yes; piles driven out to the beach, about, probably 200 feet south of where Willoughby Avenue now runs.

Q. Now, you did all that work—I mean the defendants? A. Yes, sir.

Q. And the defendants paid for it?

A. Yes, sir.

Q. Now, at that time, at the time you did that work, had you [182] sold any lots out there, do you remember?

A. Well, a few probably. Eikland had a lot and maybe one or two others. I don't just remember. The records would be the best—

Q. Now, at the lower end, where you say it was

(Testimony of W. W. Casey.)

narrower, toward the sea, how was the current there? Was it stronger? A. Oh, yes.

Q. Swifter than it was at the upper end?

A. Oh, yes.

Q. Now, you heard Mr. Wagner testify yesterday that the logs were laid across from one boulder to another. Was there any place where that was done? A. No, sir.

Mr. COBB.—Testified that what?

Mr. FAULKNER.—That the logs were laid from one rock to another, on the surface.

Q. Now, did you take any measurements at the time of the construction of the bulkhead to determine the capacity of it? Was there anything you could measure out there? A. The flume above.

Q. Where was the flume above?

A. One up at the water works and one was above there, in the basin.

Q. That would be in what basin?

A. Jualpa basin.

Q. Now, what was the capacity of the flume in the basin as compared with the capacity of the channel that you cribbed in? Which was the larger?

A. We were from forty to fifty per cent larger than the flume above. [183]

Q. That carried the waters of the same creek?

A. Yes.

Q. Was there anything you could measure out on the flats—any creek bed or creek channel that you

(Testimony of W. W. Casey.)

could measure, that would give you any information as to the capacity?

A. Nothing confined. It was just scattered and running out there in any direction.

Q. Now, you say the old—what is marked on Plaintiff's Exhibit "A," as the original channel, had by that time been filed up? I think you testified that way yesterday? A. Yes, sir.

Q. And you weren't able to take any measurements of that? A. No; no.

Q. Now, was this bulkhead, these bulkheads on the two sides of the creek constructed in a uniform manner? Was there any difference between them?

A. Not a bit.

Q. Was there any difference in the strength?

A. Not a bit; not knowingly.

Q. Where the bulkhead crossed opposite Mr. Eikland's lot, along, I think that would be in block 213 and across the street there, what was the nature of the bank on the westerly side, before the bulkhead was constructed—the natural bank?

A. It was quite high there.

Q. How high was it in comparison with the height of the cribbing?

A. I think it was a little higher than the cribbing in some places and not quite as high in others.

Q. Little higher in places? [184]

A. Yes.

Q. And it was constructed the same on both sides of the channel? A. Yes, sir.

Q. Now, at the time you built the bulkheads, Mr.

(Testimony of W. W. Casey.)

Casey, did you consult with anyone besides Mr. Opsahl?

A. Mr. Tripp and others that we talked with regarding it—engineers, surveyors.

Q. What did Mr. Trip do, if anything?

A. Went down there and looked it over and talked about it.

Q. Did you follow his advice?

A. Yes, sir; as near as I thought we needed to. We did it as we thought— We both agreed on the bulkhead.

Q. Did you make any changes in your plans there from time to time after talking with Mr. Tripp or anyone else? A. No, sir.

Q. Now, did you build those bulkheads, having in mind the conditions in the stream and the rainfall and the flood conditions that would naturally occur?

A. Yes, sir.

Q. And did you build it, in your judgment, of sufficient capacity and strength to carry the water?

Mr. COBB.—We object to that as both leading and—

The COURT.—(Interrupting.) Yes.

Mr. COBB.—(Continuing.) And calling for the opinion of the witness. He hasn't shown himself qualified to give an opinion—asking him if something was, in his judgment, sufficient.

The COURT.—Objection sustained.

Q. Well, Mr. Casey, you said you had experience before in [185] *in* building—

A. (Interrupting.) Yes, sir.

(Testimony of W. W. Casey.)

Q. You testified yesterday? A. Yes, sir.

Q. How long have you been acquainted with that section of the country, out in this tract?

A. Well, I came here in '98, and I have known it to some extent ever since.

Q. How long did you say you owned the tract?

A. Since 1903.

Q. Been familiar with it since then?

A. Yes, sir.

Q. Are you familiar with climatic conditions in this section of the country? A. I think so.

Q. Have been here continuously?

A. Yes, sir.

Q. Have you observed the rainfall?

A. Yes, sir.

Q. And the height of water in the streams?

A. Yes.

Q. During that period. Now, Mr. Casey, where do you live? Will you point out to the jury on the plat here where your home is and give them the number of the lot and block, so that the jury can see?

A. I live in lot 8, block 214. I didn't know it was marked.

Q. Now, on the morning of the 26th of September, 1918, what time did you get up in the morning—about?

A. I suppose a little after six or about six o'clock.

Q. Where did you go after you left the house?

A. Went to the barn. [186]

Q. Where is the barn?

(Testimony of W. W. Casey.)

A. Down on Willoughby Avenue; south of Willoughby Avenue.

Q. South of Willoughby Avenue. Is it on the tide flats? A. Yes, sir.

Q. Did you observe the water in the creek at that time? A. Yes, sir.

Q. How was it? What did you observe?

A. It was quite high then and raising rapidly.

Q. Now, how long did you remain at the barn?

A. We hooked up, as usual, to come up at seven o'clock, as we went to work then, and I told the boys not to go uptown; that it looked to me as though something would happen down there. The water was awful swift.

Q. How long did you remain there?

A. I stayed there until about nine-thirty, I think.

Q. Now, what was the condition down there, at the end of the stream, on Willoughby Avenue, at that time?

A. A big stump had come down and struck the bridge and lodged there and the creek filled.

Q. What bridge was that?

A. The bridge across Willoughby Avenue.

Q. Who built that bridge? A. The city.

Q. Then what happened?

A. Why the creek filled, the cribbing filled, and I went up home then, to see what was going to happen up at that end of town.

Q. Let me ask you, what was that that came down the stream and lodged at the bridge?

A. A big stump; there was a lot of stumps come

(Testimony of W. W. Casey.)

with it. One [187] big stump in particular struck the bridge, and it filled in behind that with stumps, logs, bridge timbers, some lumber.

Q. At that time how was the condition of the bulkheads? Could you see that? A. Oh, yes.

Q. With reference to the water? A. Yes.

Q. Where was the water going?

A. Going over the top then.

Q. Was it full? A. Oh, yes; full to the brim.

Q. What happened down there, if anything, where you were, down near the barn? Anybody living down there?

A. Yes; the water was high there and we moved two or three families before I went away—the Kelly family and I forget the other man's name now.

Q. I hand you Defendant's Exhibit "D," Mr. Casey, and ask you if you own any of the structures in that picture? A. No, sir.

Q. Was that where you—

Mr. COBB.—What was that question? I didn't catch it.

Mr. FAULKNER.—I asked him if he owned any of the structures shown in the picture, Defendant's Exhibit "D."

The WITNESS.—I was near there; I was right over here on Willoughby (indicating).

The COURT.—Wait a minute. Did you hear that?

Mr. COBB.—Yes, sir. I misunderstood as to the word "structures."

(Testimony of W. W. Casey.)

The COURT.—Where were you? He asked you where you were?

A. I was on my own platform, or on Willoughby Avenue, in front [188] of the houses you see here (pointing).

Q. On which side of Willoughby Avenue is that?

A. This (indicating)?

Q. No; on which side were you?

A. On Willoughby Avenue, or south of it.

Q. Your barn, you said, was on the seaward side?

A. Seaward side.

Q. What was the condition down in the creek, as shown in this picture, with reference to water at that time?

A. Well, water was going in almost every direction.

Q. Was there a good deal of water there or not?

A. There was a good deal of water there.

Q. Pretty well filled up, was it? A. Oh; yes.

Q. Now, where did you go from there?

A. I went up home.

Q. What time was that, approximately?

A. Well, as near as I can remember, it was nine-thirty, or about nine-thirty.

Q. In the morning? A. In the morning.

Q. What was the condition at your home after that time?

A. Well, the water had commence to cut into the bank along the road going to the cemetery and above the flume.

Q. Now, I will hand you Defendant's Exhibit 3

(Testimony of W. W. Casey.)

in this case, and ask you if you can mark there right over your house, a cross, so as to indicate it to the jury. A. (Witness does so.)

Q. Now, Mr. Casey, at that point, as shown in this picture, there is a bulkhead shown on the westerly bank of the stream. [189] When was that bulkhead placed there? A. After the flood.

Q. That was after the flood. Now, before the flood, what was the nature of that ground there?

A. High bank.

Q. About how high? A. Well—

Q. Approximately?

A. I suppose eight or ten feet.

Q. Was it a permanent bank? Describe the nature of the bank. What was on it.

A. It was a growth of timber and brush, big rocks, grasses—

Q. Any stumps? A. Some stumps.

Q. Where was the water going with reference to that bank at the time you were up there? Where was the water going in that direction?

A. Going over toward the Northern Laundry, down Eleventh Street and towards my house.

Q. What was the condition of the creek at that time? A. Very high.

Q. Very high. A. Yes.

Q. Was it slow or swift? A. Awfully swift.

Q. Water was going over the westerly bank, you say, in the direction shown by the picture?

A. Uh-huh.

Q. Now, what did it do to that bank?

(Testimony of W. W. Casey.)

A. Cut it away. [190]

Q. What else was over there in that vicinity—any other structures?

A. Many other houses.

Q. Whose houses were there?

A. Day owns a house there; owns two houses.

Q. Ray Day?

A. Ray Day, and others own houses there.

Q. Who else?

A. My son owns a house there—did.

Q. Now, you say that water was going over there at the time you arrived? A. Yes, sir.

Q. Nine-thirty in the morning? A. Yes, sir.

Q. Now, Mr. Casey, was there anything else there on that ground? Was there an electric tower there? A. Yes.

Q. Did you observe that tower? A. Yes.

Q. What happened in that vicinity, if you know?

A. There was a jam formed on that; it caught the timber and logs that came down and formed a jam there.

Q. Where did that water go that ran over on the west side of the bank near the laundry? In which direction did it go?

A. Some of it went down on Eleventh Street and the rest of it came down by my house and down over the bottom.

Q. Some of it followed the course of the bulk-heads?

A. Followed them around that way, right down towards the beach.

(Testimony of W. W. Casey.)

Q. Now, do you know what occurred further down on Eleventh Street, out towards the beach, where the old ball ground used to be, with reference to the water? [191]

A. Well, there was a culvert washed out down there, a culvert blocked up and flooded, and Mrs. Kabler's house was right in the wake of that, right in the line of that water. It flooded her house, washed out the road a little that goes down the extension of Willoughby Avenue, at C Street, E Street, and ran down to the beach.

Q. Now, at the time the water washed out the west bank near the laundry, you say there was no bulkhead up there at the time of the flood; I think you said there was no bulkhead up there in the vicinity shown in this picture.

A. A bulkhead here (indicating)?

Q. Yes.

A. There was no bulkhead there.

Q. The bulkhead was built afterward. Now, at the time the water washed over there and washed out that area, what was the condition of the cribbed channel?

A. Well, it was full, running as far as it could.

Q. It was broken?

A. It hadn't broken then.

Q. Now, was there water on the outside of the cribbed channel? A. Yes.

Q. Both sides? A. Yes, running right over.

Q. And clear up on top? A. Yes.

Q. What did you do there that morning?

(Testimony of W. W. Casey.)

A. Why, I went up there—

Q. Before you get to that, I will ask you if you did anything for anybody before you went up from the barn?

A. Oh, yes; we moved a couple of families that were in houses [192] near the creek.

Q. Now, after you arrived in the vicinity of your own house, what did you do, if anything?

A. Well, we went to digging a ditch to see if we couldn't kind of control the water a little bit. There was a number of men there with shovels and I got some more and we dug a ditch east of my house and got an old log and threw it in there, made a little wing dam like to steer the water away from my property, my house, as near as I could. It ran over the lots; and Ray Day and the boys and I we went up then to the creek, three or four of us, to see if we could do anything up there. Day came running down and said it was going to wash his house out, and we went up there to see if we could do anything, but the water was so swift that it was dangerous to get near.

Q. Made a dam, you say? A. Yes, sir.

Q. Did you go to Gold Creek bridge that morning? A. Yes, sir.

Q. I mean the bridge leading to the cemetery?

A. Yes, sir.

Q. What happened to that bridge, if anything?

A. It went out later.

Q. When was that bridge put in there, Mr. Casey?

(Testimony of W. W. Casey.)

A. It was there when I came here. That is, that bridge?

Q. That bridge?

A. That was put in in 1914.

Q. Now, had there been a bridge prior to that time? A. Yes, sir.

Q. When was that bridge put in? [193]

A. It was there when I came.

Q. In what year? A. 1898.

Q. What happened to that bridge?

A. They tore that down.

Q. Who tore it down?

A. Tom Bush and myself and some helpers that I had.

Q. You assisted them? A. Yes, sir.

Q. Why did you take that bridge down?

A. They had built a bridge to replace it.

Q. Why?

A. It was older, and he got a truck that would carry a yard and a half or two yards of gravel, to build the Goldstein Building, and he didn't think that this bridge was safe to carry it. They didn't consider this bridge safe for that kind of a load.

Q. That was the reason he built the new bridge?

A. Yes.

Q. Where did the bridge go on the 26th of September, when it went out? A. I—

Q. Where did it go when it went out?

A. Down the creek.

Q. Down the stream? A. Yes.

(Testimony of W. W. Casey.)

Q. Did anything else come down the stream that you know of besides stumps, rocks and logs?

A. A lot of other timber, logs and stumps and some lumber.

Q. Anything that you know of up in the basin that went out? [194] Anything that you know of, of your own knowledge, that came down?

A. There was another bridge. The lining out of the flume came down.

Q. What was the difference between the height of the bridge at Gold Creek that went out that day, the 26th of September, and the height of the old bridge that was there before that time? Which was the higher? A. The new bridge was higher.

Q. How much higher?

A. Probably, some place, between four and five feet. They used it for a staging to work on and I wouldn't be positive. I know I was on the lower bridge and we walked around under it, but it was not quite my height.

Q. And it was the higher bridge that went out this day? A. Yes, sir.

Q. What was the condition of the water in that vicinity, when you went home, if you noticed; that is, on the easterly bank of the creek?

A. There was little or no water running there, then.

Q. When the water went over there, how was it, swift current there? A. Oh, very swift.

(Testimony of W. W. Casey.)

Q. How did it compare with the water on the westerly bank? Was it as low?

A. Just as swift; possibly swifter. It was lower.

Q. Now, you say you were there when Mr. Eikland's house went out? A. Yes, sir.

Q. What happened to the house after it went out into the stream? [195]

A. Why it floated off and hit the bridge crossing Ninth Street and lodged there.

Q. Did it collapse? A. Yes, sir.

Q. What happened to Mr. Ingman's house?

A. It landed on the creek bottom and stayed there.

Q. Where is it now?

A. He moved it over on to another lot; lives in it.

Q. Still living in it? A. Yes, sir.

Q. Now, Mr. Casey, you say the water on one side of the bulkhead was flowing about the same as on the other side about that time?

A. Well, it was very swift every place it cut.

Q. Was the whole space in between filled with water? A. Yes; yes.

Q. Now, Mr. Casey, you heard Mrs. Michaelson's testimony yesterday about the smokehouse?

A. Yes, sir.

Q. That was down in the vicinity—

A. I know where that smokehouse was. It was in the block that the Government hospital is in now. We gave it to the Government, practically half, or a little over, of a block, which was on the corner on

(Testimony of W. W. Casey.)

the northwest portion of the other part of the block.

Q. You gave it to the Government, a portion?

A. Yes, sir.

Q. What happened to that smokehouse?

A. I tore it down.

Q. You remember when? [196]

A. It might be three years ago; four years ago, or something. I don't just remember. I know I gave it to the Indians and they took some lumber and the rest of it went for kindling.

Q. Were you familiar with Mr. Eikland's house?

A. Only with the appearance; outside appearance.

Q. And were you familiar with the values of property in Juneau at the time of this flood?

A. Yes; I know what some other property was worth.

Q. Now, you have been selling property?

A. Yes.

Q. And how had you been selling it?

A. We sold some lots, but things had gotten very quiet and the town had gone backwards very fast.

Q. What, in your opinion, would that house and lot be worth at that time? A. I don't—

Mr. COBB.—I don't think he is qualified, if the Court please, and I object. He sold some lots, but it doesn't appear that he knows anything about values so far.

The COURT.—Well, you might ask him if he was acquainted with the market value of property in that neighborhood at that time?

(Testimony of W. W. Casey.)

Q. Were you acquainted with the market value of property out there? A. I think so.

Q. You lived in that tract? A. Yes, sir.

Q. And say you had been selling property there?

A. Yes, sir.

Q. What was the market value of Mr. Eikland's house at that [197] time, and lot?

A. Oh, I suppose it would sell for twelve, fifteen hundred dollars.

Mr. COBB.—Now, I object to what he supposes. If he knows anything about it and knows the property—

The COURT.—(Interrupting.) Ask him what he knows.

Mr. COBB.—(Continuing.) He is qualified to speak.

The COURT.—Ask him what he knows as to what the market value of that property would be at that time.

Q. What would that be?

A. Well, I would state if I were buying, I would hate to give any more than that.

Mr. COBB.—I object to that and ask that it be excluded.

The COURT.—Yes.

Q. Give us your idea of what the property would be worth.

Mr. COBB.—I object to his idea unless he is qualified.

Mr. FAULKNER.—Well, a man can't tell what some property is worth unless he buys it or sells

(Testimony of W. W. Casey.)

it. The next best thing you can do is to get his opinion, and if he is qualified and knows the value of property in that vicinity, why his opinion as to the value of that property is the best evidence you can get on that point unless he bought this place or sold it.

Mr. COBB.—I don't agree with counsel. He can show, in addition to that, that the conditions in Juneau were such—it was war times then—that there was little demand for property. People were not buying and selling.

The COURT.—That is a matter of cross-examination for you. He has stated that he knew the market value of property. It is your privilege to cross-examine him at the proper [198] time, as to what his knowledge is. You can avail yourself of that privilege.

Q. Now, you say that it was worth twelve or fifteen hundred dollars? A. I—

The COURT.—(Interrupting.) Is that your opinion of it?

A. Yes, that is to say, that would be the market value.

Q. Now, Mr. Casey, did you observe the flood conditions and the damage done by the flood, this particular flood, on September 26, 1918, in other portions of this town and other places in the vicinity? A. Yes, sir.

Q. Now, describe to the jury what was done by that flood?

A. That evening, about four or five o'clock, or

(Testimony of W. W. Casey.)

something like that, some people telephoned down to me and wanted me to come up and see a slide up on Chicken Ridge—

Mr. COBB.—Now, we object to that.

Q. Just tell what you did, Mr. Casey.

The COURT.—Objection sustained; strike that out.

Q. Just tell what you did.

A. I went up to Charley Garfield's house to see regarding the safety of the building, whether or not it would stand or fall over the hill, and they were moving. They had moved their furniture out and I told them that if we struck a timber under a corner, it was safe enough to stand the storm, as the storm was subsiding.

Q. Where is his house?

A. Right at the head of this street (meaning Main Street).

Q. What had occurred that day?

A. One of the—a portion of the bank under it had washed away. [199]

Q. Of the lot? A. Of the lot.

Q. What else occurred in any portion of Juneau.

A. It slid away, or something. It went away, anyway. It wasn't there.

Q. What else occurred that you observed?

A. Some slides on Swede Hill.

Q. What happened over there?

A. There was at least two houses come down and hit Walter Bathe's house and piled up down on the road.

(Testimony of W. W. Casey.)

Q. Where was that, about?

A. That would be a block south of Front Street, right back of the Gastineau Hotel.

Q. How long had these houses been there, that you know of?

A. Well, the upper house, I think, was there when I came here, or about that time. The lower house, it was an old house, too. I couldn't say the exact number of years it had been there; probably fifteen, twenty years.

Q. Now, do you know Gillen's house?

A. Yes.

Q. What happened to that, if anything? Mr. Jim Gillen's house, do you remember it?

A. I don't recall.

Q. You don't recall. Now, did you observe, after the flood, any damage that was done up the basin road, what is known as the basin road?

A. Yes.

Q. What happened there?

A. A good portion of the road or the bank went out, and damage [200] done up the creek.

Mr. FAULKNER.—That's all.

Cross-examination.

(By Mr. COBB.)

Q. Well this damage that you are talking about, the slide that occurred up there at Charley Garfield's place, that wasn't caused by the creek, Gold Creek, was it? A. Caused by water.

(Testimony of W. W. Casey.)

Q. Answer my question. It wasn't caused by Gold Creek? A. No.

Q. Don't you know that what went out, that you are referring to up there as that slide, was the loose earth which had slipped down that steep bank from the top of Chicken Ridge, that had been thrown out there when Wettrick built his house next to it?

A. I wasn't familiar with the ground before that time.

Q. You weren't familiar? A. No.

Q. You didn't know that it was nothing else in the world but loose earth that had been thrown up there when Wettrick was building his house, and it slipped down the bank there, did you?

A. I had nothing to do with that building.

Q. You don't know anything about that?

A. No.

Q. But it wasn't the creek that caused it; it wasn't the high waters of Gold Creek that caused that? A. It was rain.

Q. Well, answer the question. [201]

The COURT.—He asked you if it wasn't the creek that caused that. A. No, sir.

Q. No. And up the basin road, those slides were simply caused by the rainfall, heavy rainfall?

A. I presume so.

Q. And not the high water in the creek.

A. Well, the flume at the bottom of the creek had washed out.

(Testimony of W. W. Casey.)

Q. The flume; that is, you refer to the flume that Dick Lewis put in? A. Yes.

Q. Of the waterworks? A. Yes.

Q. But the slides on the road weren't caused by the high water in the creek?

A. Well, if the creek had washed the bottom out, it might cause that slide.

Q. It might, but it didn't, did it?

A. I don't know.

Q. You don't know. Now, every year almost, they have slides up there with much or little rain, don't they? A. Well, they have slides.

Q. You know of one big slide, don't you, that came down there and filled up the road for two or three hundred yards and about thirty feet deep?

A. Yes.

Q. When there wasn't any heavy rain either.

A. Possibly.

Q. Now Mr. Casey, coming back to this flume in the creek up there, how long is that flume? [202]

A. About twelve hundred feet.

Q. The Dick Lewis flume?

A. Oh, the Dick Lewis flume. I don't know; I don't know.

Q. Isn't over a hundred or a hundred and fifty feet long, is it—small flume?

A. Well, it's a small flume.

Q. Just protects the pipe-line where it goes under to get this spring water, that's what it was put there for, wasn't it?

A. Well, it was put in there for his water; yes.

(Testimony of W. W. Casey.)

Q. Now, that flume has about a twelve or fifteen per cent grade, hasn't it? Goes down very steep.

A. I couldn't—I wouldn't say.

Q. You wouldn't say how much grade, but you know it's steep?

A. Well, I know some water runs in it.

Q. Of course, water runs in it. Answer my questions fairly.

A. I don't know. I never was at the flume.

Q. You have been there lots of times and seen it, haven't you? A. From the road.

Q. Now, even at low stages of water, the water, down that grade runs very swiftly, doesn't it?

A. Why, I suppose it does.

Q. You suppose it does. Don't you know?

A. No, sir.

Q. Don't know? A. No, sir.

Q. May stand still there for all you know?

A. It might. I never was at the flume.

Q. You looked down on it lots of times?

A. Yes.

Q. Seen water running in it? [203]

A. I presume so.

Q. Don't you know.

A. Well, I never paid any attention to it.

Q. Didn't pay any attention to it. Do you tell this jury that you don't know whether you have ever seen water running in there or not?

A. I seen it was there to carry water. It was Dick Lewis' flume, and I wasn't interested.

Q. You wasn't interested in it. Well, how in

(Testimony of W. W. Casey.)

the world do you know then, that you built your flume with about a fifty per cent greater capacity.

A. You're talking about one flume; I'm talking about another.

Q. You told your counsel on cross, on direct examination, Mr. Casey—

The COURT.—Now, wait a minute. Don't argue with him.

Q. Didn't you state to your counsel, then, that you built your flume—

A. (Interrupting.) Yes.

Q. With a forty to fifty per cent greater capacity than the flume up the basin? A. Yes.

Q. Well, how do you know— A. Measured it.

Q. (Continuing.) Anything about it?

A. Know how wide it is.

Q. How is that? A. I know how wide it is.

Q. You say you didn't notice the grade?

A. No; I did not.

Q. Well, did you notice the depth? [204]

A. Well, measured it; yes.

Q. How is that? A. Measured it.

Q. Measured the depth of the flume up there?

A. Yes, sir.

Q. Did you do that? A. Yes, sir.

Q. And yet you don't know whether water even runs in it or not?

A. Yes; water runs in the flume over the water-works all the time, pretty nearly; yes, sir.

Q. Did you measure its length?

(Testimony of W. W. Casey.)

A. Why, if I remember right, I did, but it's so long ago I have just forgotten.

Q. But you know nothing about its grade—steepness?

A. Well, I don't. I'm not accurate on that.

Q. Well, can you answer this question: Hasn't it a great deal steeper grade than the flume that you built down on the flats?

A. Well, it may be more than two feet to the hundred, but I wouldn't say.

Q. Well, don't you know that the creek, the whole creek along in there, in the canyon, is a great deal steeper than it is when it gets out on the flats?

A. I presume so; it looks steeper.

Q. Yes; you presume so. Now, Mr. Casey, did you ever testify before in this case? A. Yes, sir.

Q. On the first trial, and the second, too, did you tell the jury that you saw a stump catch on the bridge at Ninth Street. A. Yes, sir. [205]

Q. Can you find it in your testimony? It's all printed.

A. Maybe; I don't know that I was asked that question.

Q. Oh, you wasn't asked that question.

A. Might not have been. I couldn't remember.

Q. You couldn't remember. You state that it was narrower down there? A. Yes, sir.

Q. And deeper? A. Yes, sir.

Q. Water ran swifter? A. Yes.

(Testimony of W. W. Casey.)

Q. Now, as a matter of fact, it runs out to the salt water? A. Yes, sir.

Q. And the tide rises up in the lower end of it?

A. Yes, sir.

Q. When the tide comes up in it, it stops the current entirely, doesn't it?

A. Well, it depends on the height of the water. No; it never stops it entirely.

Q. Well, checks it up? A. Checks it.

Q. Well, it checked it up? A. It did.

Q. That causes a deposit there, doesn't it, of whatever is coming down the creek?

A. Unless it is very swift.

Q. How is that? A. Unless it is very steep.

Q. Unless it is very steep. Now, I want to ask you a few questions—you testified about this plat, Mr. Casey? Well, [206] before I get to that, have you ever been in Mr. Eikland's house?

A. I don't suppose I ever was.

Q. Do you know anything about the construction of it?

A. No; only I seen it built there.

Q. You don't know the grade of the materials that went into it? A. No, sir.

Q. How many rooms were in it, you don't know?

A. No, sir.

Q. Nor whether it had, what kind of foundation it had?

A. Why, I believe I seen him working on the foundation. I think it had concrete under it.

(Testimony of W. W. Casey.)

Q. You don't know anything about that construction—whether it was good, bad or indifferent?

A. No.

Q. Don't know how many rooms there were in the house, do you? A. No.

Q. Upon what do you base this opinion that you have given, then, that it was only worth twelve hundred dollars?

A. Well, it was a small, rather small house, probably a story and a half, about twenty by thirty, some such size as that; might be bigger, maybe twenty-two by thirty.

Q. Might have been ten by ten, so far as you know? A. No; it was larger than that.

Q. Bigger than that? A. Yes.

Q. Well, you know that you and your partners were paid six hundred dollars alone for the lot?

A. Yes, sir.

Q. And do you think that that house could be built for anything [207] like an additional six hundred dollars?

A. No; I don't think it could.

Q. Don't think it could? A. No, sir.

Q. But you think that anybody could have bought property of that kind, lot and all—a house that cost \$2700 and a lot that cost \$600—for \$1200 in 1918?

A. I think he would have had a hard time selling it for that.

Q. How's that?

(Testimony of W. W. Casey.)

A. I think he would have had a hard time selling it for that.

Q. You think he would have had a hard time. You think anybody could have bought it for that?

A. I don't know.

Q. You don't know.

A. Whether he could sell it for that or not.

Q. How is that?

A. It depends on whether he would have sold it for that or not.

Q. Now, isn't it a fact that on account of the war, there was but little dealing in property here, and you didn't cut the price of your lots that was on the market, did you?

A. About in two in the middle.

Q. How's that?

A. About in two in the middle.

Q. Whom did you sell to any cheaper than you had it on the market before?

A. Oh, to some.

Q. Did you advertise it on the market that you had cut prices?

A. No; no; we did try to sell some houses and lots that we owned there, but failed to do it in most instances.

Q. As a matter of fact, you don't know of any other property [208] selling about that time, do you?

A. Well, there was a deal made once in a while.

Q. Uh-huh. A. But not very often.

Q. No. Now, then, step down here, please. I

(Testimony of W. W. Casey.)

want to ask you two or three questions about this. Now, Mr. Casey, you understand this map. You have studied it a number of times? A. Yes.

Q. Your property is where—the house that you are living in? A. Right there (pointing).

Q. That was on the northwesterly side of the old channel, the original channel, as shown on this picture? A. Northwesterly side of Tenth Street.

Q. That is what is marked as the old original channel? A. Yes.

Q. Your property wasn't damaged on that occasion?

A. Well, the lot was washed; no, not the house. The basement filled up; couple of feet of water in it; couple of feet of water around the place.

Q. Now, the cribbing that you put in on the easterly side of your cribbed channel, across block 208 and block 209, along there, was that cribbing higher than the bank just back of it? A. No, sir.

Q. The bank was higher than the cribbing?

A. No, sir; the cribbing—

Mr. FAULKNER.—Little louder; Mr. Casey.

A. The bank wasn't at the cribbing. It was back from the cribbing; built right in the creek bottom.

Q. Built right into the creek bottom? [209]

A. Yes, sir.

Q. But when you did get back of the creek to the bank, how far from the high bank was your cribbing? A. Oh, it varied from—

Q. Well approximately.

A. From nothing at the upper end to probably

(Testimony of W. W. Casey.)

fifty, sixty feet, washed out up here, and back to nothing at the lower end.

Q. I'm not talking about the washout—how far it was from any washout.

A. I'm talking about that time.

Q. Was it as much as fifty or sixty feet?

A. Yes.

Q. Whereabouts was it fifty or sixty feet?

A. I wouldn't be positive, but I think—

Q. (Interrupting.) Well, we have got a picture here that shows that—Exhibit “G.” I want you to point out fifty or sixty feet of low ground on there that shows in that picture. While they're waiting for that, I will ask you another question: Was the top of your embankment higher or lower than the high ground back of it; that ground back of it.

A. Back of this, the ground, I suppose, was higher.

Q. Higher than the top of your embankment?

A. Yes.

Q. Then, this low ground back of it was a part of the creek-bed you say, was it? A. Well, yes.

Q. In other words, you narrowed the creek-bed along there?

A. The bulkhead up there is straight.

Q. Well, you did narrow it, didn't you? You got the bulkhead built, the channel, the bulk-headed channel, was not as wide as the original channel? [210]

(Testimony of W. W. Casey.)

A. No; there was a wash in there.

Q. Part of the creek channel?

A. Water had run there sometimes.

Q. Now, I want you to point out to the jury on here that fifty or sixty feet wide, where it is fifty or sixty feet wide? A. Right in there (pointing).

Q. Was your—

A. (Continuing.) Directly behind, or northwest; no, on the north side of the bulkhead and north of the Eikland house, due north as the flume would run.

Q. That is what you have pointed out, what you refer to as being fifty or sixty feet wide?

A. In the widest place. It commenced at nothing and ran out to fifty or sixty feet a couple of blocks long.

A. Now, none of that low ground was on Eikland's property?

A. I don't believe so. It was very close.

Q. How wide is the channel there?

A. Oh, between thirty and forty feet, thirty-eight feet.

Q. It wasn't just thirty?

A. No; it was built for thirty-five feet. Might be a little narrower or a little wider. I won't testify as to just thirty-five feet, but that is what it is supposed to be. At the upper end it was sixty. We're very close to the upper end now.

Q. Didn't you testify before that all along this portion of it it was only thirty feet?

A. Yes, it was thirty-five feet; over thirty.

(Testimony of W. W. Casey.)

Q. Didn't you testify before that it was thirty?

A. I don't think so.

Q. You heard Mr. Stewart's testimony? [211]

A. Oh, yes.

Q. That he measured it? A. Yes.

Q. And it was thirty? A. Yes.

Q. You never contradicted that, did you?

A. I don't know.

Q. Now, referring again to Mr. Stewart's map and to that portion of the cribbed channel that runs across block 208 and block 209, was the ground back of the flume, back of your cribbing, on the westerly side there, higher or lower than the top of the cribbing?

A. In some instances, it was about level; in some instances, it was, maybe, a foot or one log lower; in some instances, it is higher.

Q. Whereabouts was it higher and whereabouts was it lower?

A. This portion of the tract along here (showing) is quite a bit higher.

Q. That is on block 208?

A. 208. And along here in the fill, there is a place here, maybe one log sticks up, and then you get up here in 213, there was a place there that was much higher.

Q. That was a hump in there that you had to cut through? A. Yes, sir.

Q. There was some high piece of ground then about the alley? A. There was.

Q. In block 213, is that about where it was?

(Testimony of W. W. Casey.)

A. Block 213; down in here (pointing).

Q. There was a hump there you had to cut through?

A. Yes, sir. Block 208 shows itself it's higher yet. [212]

Q. But at the crossing, or intersection of Tenth, about at the intersection of Tenth Street and B Street, the top of your flume, or your bulkhead, on the westerly side, was lower than the ground behind it? A. Maybe one log inside there.

Q. Well, it was lower?

A. That is, in some portions. In some places there, there may be one log that sticks up.

Q. Now, you told the jury on this occasion that up to the time that you built your cribbed channel, there was no water at all flowing on what Mr. Stewart has marked as the original channel?

A. None at all; no, sir.

Q. Didn't you testify on the first trial of this case that there was water running in there, but that the most of it was running that way (showing)?

The COURT.—Wait a minute. You object?

Mr. FAULKNER.—What is that?

The COURT.—You object?

Mr. FAULKNER.—Yes; I'll ask counsel to cite the particular question.

Q. I am asking him if he so testified. Didn't you so testify? A. I don't think so.

Q. Didn't your counsel ask you this question on the first trial: Question: "Did any portion of it go

(Testimony of W. W. Casey.)

down in the channel that is marked on Plaintiff's Exhibit 'A'—that is, this map—"as the cribbed channel"?

The COURT.—What page?

Mr. COBB.—How's that?

The COURT.—What page? [213]

Mr. COBB.—That's on page 212.

Q. You remember that question being asked you?

A. No, sir.

Q. And you answered, "Yes." You remember answering that way?

A. It might have been; I don't know.

Q. Question: "Did the most of it go down there"?
Answer: "A good portion of it; when the water was low; the most of it ran there." Was that your answer? A. I don't know.

Q. How is that?

A. I couldn't remember that; that's several years—

Q. If that was your answer, however, you didn't state that it all ran the other way—most of it ran in the cribbed channel—

Mr. FAULKNER.—There is one thing I would like to suggest. I don't think that counsel should read to the witness just one question or answer. I think Mr. Cobb ought to read, to be fair with the witness, the preceding question or two.

The COURT.—I can't understand it myself.

Mr. COBB.—Very well. I'm simply attempting to get at the facts of this case. How far do you want me to go back?

(Testimony of W. W. Casey.)

Mr. FAULKNER.—Well, this question here, I'll suggest that.

Q. "Whereabouts did the water go at that time, Mr. Casey, before the cribbing was put in on the banks of the creek?" Answer: "It would flow over at any place." You remember answering that? A. No, sir.

Q. "Did any portion of it go down in the channel that is marked on Plaintiff's Exhibit 'A' as the cribbed channel?" Answer: "Yes." You remember that? [214]

A. No; I can't recall those questions to mind.

Q. "Did the most of it go down there?" "A good portion of it; when the water was low the most of it ran there." Is that your testimony?

A. Probably it was.

Q. Now, on this occasion, you tell the jury that it all ran there.

A. No; I don't know as I did. It ran about that—when we built the channel, the water was very low in the winter-time at that time. We commenced to build that cribbed channel when there was little or no water and—

Q. (Interrupting.) Now, as a matter of fact, you know that there was a channel running over that way that carried a lot of water, don't you?

A. A number of years ago.

Q. Did it carry it in 1913?

A. In 1913 it blocked up or filled.

Q. Did it carry that water?

A. In the early part of that year.

(Testimony of W. W. Casey.)

Q. Didn't it carry it in August?

A. In the early part of the year.

Q. Didn't it carry in August?

A. I won't say what month it was.

Q. Didn't you approve and sign a plat here that showed that to be the stream on your ground?

A. To-day there is a ball ground on there.

Q. I'm not asking you about to-day, Mr. Casey. Didn't you, in August, 1913, sign a map and put it on record here, showing that that was the only channel? [215]

A. No; I don't think so. We signed the plat that was turned in. I'll say I signed that.

Q. You'll say you did do that.

A. I'll say I did. We signed that.

Q. And it showed that that was the only channel, didn't it? A. Yes.

Q. You didn't have it changed?

A. We didn't care to.

Q. You knew it was correct, didn't you?

A. There was water running there; lots of it running here, too (indicating).

Q. You were responsible for that flume—you and your partners? A. Yes, sir.

Q. You planned it? A. Yes, sir.

Q. And had it built? A. Yes, sir.

Q. At the time that you went up to Mr. Eikland's house, the day it was destroyed, did you observe, coming from your cribbed channel, at a point somewhere along about block 208, a strong current towards the easterly bank, after the cribbing had gone out? A. Well—

(Testimony of W. W. Casey.)

Q. Did you go towards the bank instead of alongside of it?

A. I didn't go up to Eikland's house.

Q. You didn't go over to Eikland's house?

A. No.

Q. You didn't see it?

A. I seen water flow over on that bank.

Q. You seen the water flow over toward that bank as though [216] you put—

A. (Interrupting.) Yes, sir.

Q. (Continuing.) As though driven by a wing dam?

A. No, it was the natural consequences. Water comes out of the basin in this shape and it strikes that bank, and there was a big jam formed there, and wherever—

Q. (Interrupting.) You don't claim that it doesn't show correctly the course of the cribbed channel?

A. Oh, yes, it does; but we're talking about the creek. It strikes this bank and cut over here. There was a big jam formed—

Q. Answer my questions. I don't want you to argue the case to the jury now.

A. (Continuing.) And then threw it over this way (indicating) and the natural consequences—

Q. (Interrupting.) Was it thrown over from here (pointing)?

A. Wherever it hit that bank on the curves, water was running this way (indicating).

Q. If the water was running over the course of

(Testimony of W. W. Casey.)

the stream, what was there to throw it against the bank?

A. The flume was full of rocks and debris and stumps—

Q. (Interrupting.) Full of logs that had come out of it, too, wasn't it?

A. And some house just below.

Q. It was full of logs that had come out of your bulkhead, wasn't it?

A. There was a couple of logs there after the thing went down.

Q. You did see them? A. Yes, sir.

Q. And they acted as a wing dam? [217]

A. The flume was full below there.

Q. How far down was it full?

A. At Ninth Street, Mr. Eikland's house was in there and so was the bridge.

Q. Below Ninth Street, it was full of debris?

A. Yes, sir.

Q. And the water just simply had to escape from the channel provided for it after it was blocked up? A. The channel was full.

Q. Full of debris so that the water couldn't flow through it. The waters along there from block 208 down simply had to escape at some place?

A. Yes.

Q. From the channel? A. Yes.

Q. Couldn't go through the flume or the cribbed channel? A. No.

Q. Just one other question, Mr. Casey. Come here just a moment. Counsel asked you something

(Testimony of W. W. Casey.)

about a tower going out and I now call your attention to plaintiff's—

Mr. FAULKNER.—Defendant's Exhibit "A" or 1.

Q. Defendant's Exhibit No. 1, and call your attention to the tower shown in the middle foreground of that picture. Is that the tower you referred to?

The COURT.—He didn't testify that any tower went out.

A. I hadn't been asked about any tower that I remember.

Q. What was it you were testifying about?

Mr. FAULKNER.—That jam at the tower there.

Q. Was that the tower that you referred to in your direct examination? It didn't go out? [218]

A. No, no; a jam formed there.

Q. What time of the day was that?

A. Oh, I suppose it was eleven, twelve o'clock.

Q. After your flume had quit carrying water?

A. Well, you couldn't see any more. Water was too high to tell anything about it.

Q. Didn't you state that a jam formed about nine o'clock; that the flume was full at the lower end? Didn't you state that a jam formed down at Willoughby at ten o'clock or nine o'clock?

A. Well, in the neighborhood of that.

Q. In the neighborhood of that; the same as Mr. Stearns said. A. I wouldn't be positive.

Q. And then immediately filled up behind?

A. Yes.

Q. So that at the time this jam up here, that you

(Testimony of W. W. Casey.)

are referring to, formed, why the waters along in the area shown in the middle of that picture had jammed up so they couldn't go down your flume?

A. We had—

Q. Answer my question.

A. No; the flume was full.

Q. Couldn't go down? A. No.

Q. Just show us. Will you show us where that old original channel starts on that picture, the one that is marked "original channel" on there?

A. I believe I would say from there (indicating). At about Tenth Street, here, right here, we put in a bulkhead, timbers. Here is where I live. Here is the turn that the jam formed on—saved these house here and threw the water the other [219] way. Saved me from going down.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. Casey, Mr. Cobb read some questions to you from the record in the former case. Now, I want to ask you if the next question that was asked you by me at that time was not this: "Did the most of it go down there"? referring to the cribbed channel?

Mr. COBB.—I read that, and besides they couldn't cross-examine him as to explanations of his testimony. They can't call his attention to his testimony in cross-examining him.

Mr. FAULKNER.—I think that would be all right. There is that question. I don't think it

(Testimony of W. W. Casey.)

makes much difference.

The COURT.—Objection overruled. He may read the questions.

Q. I'm just going to read one. And did you answer that— Question: "Did the most of it go down there"? referring to the cribbed channel, and did you answer that "A good portion of it when the water was low; most of it ran there"?

A. That would be my answer now. I suppose I said that then.

Q. Now, Mr. Cobb asked you about the slide up in the basin on the basin road, some years ago—a large slide. A. Uh-huh.

Q. Was that a landslide or a rockslide, if you know?

A. Part of the mountain came down. I think it was mostly rock.

Q. Now, how long, Mr. Casey, were the bulkheads built on the banks of Gold Creek by you from the lower end up to the upper end?

A. The distance and length?

Q. Yes; distance from one end to the other? [220]

A. About twelve hundred feet.

Q. What was the grade, if you know, at the upper end, compared with the grade up in Jualpa basin, where the waterworks flume is?

A. It's about a two per cent grade.

Q. Do you know whether there was any difference between that grade and the grade of the water company's flume?

(Testimony of W. W. Casey.)

A. I would suppose the water company's flume might be a little steeper.

Q. Do you know what the grade of Gold Creek is up in Jualpa basin? Do you know whether there is any difference between it up there and—

Mr. COBB.—I object to that as not proper re-direct examination. He wasn't asked anything about the basin. He was asked about the steepness of it coming through the canyon. Up in the basin there is a flat up there that is like the land down here.

The COURT.—I think your question was as to upper Gold Creek, though.

Mr. COBB.—How is that?

The COURT.—I think your question referred to upper Gold Creek.

Mr. COBB.—No; it was the canyon that I referred to, where this flume that they are talking about, is in place.

Mr. FAULKNER.—Well, the purpose of it was to show that there is a big flat up there and Mr. Cobb missed that in his statements.

The COURT.—Yes.

Q. Now, Mr. Cobb asked you about the construction of Mr. Eikland's [221] house. Did you see that house when it was being built? A. Yes.

Q. What, if anything, happened to it?

A. Fell over.

Q. Fell over?

A. Partly slid over on one side. Didn't fall over.

(Testimony of W. W. Casey.)

The house didn't fall over. The foundation gave way and it slid over on the ground.

Q. Now, there is one more question I want to ask you, Mr. Casey. At the lower end of this bulkhead, as shown in Defendant's Exhibit "D," I will ask you to state to the jury what is in there now.

A. Stumps and logs and rubbish.

Q. Now, are there any logs there, or just stumps?

A. Principally stumps, maybe logs.

Recross-examination.

(By Mr. COBB.)

Q. Mr. Casey, you spoke about his house falling over on one side, is that when it was in the process of construction? A. I believe it was.

Q. And the wind struck it before—

A. (Interrupting.) I believe it was enclosed, and I don't know how near completed it was.

Q. And it was before the foundations were put in; just put up so that the foundation could go in under at that time that the wind blew one of them under, didn't it? Or do you know anything about it further than the fact that it did go down?

A. I just know that it was laying over on one side on the ground. [222]

Q. And you know that it was also in the process of being built?

A. I don't know. It was enclosed.

Q. Well, then, can't you answer my question directly. Wasn't in the process of construction?

A. I suppose so. I don't know whether it was

(Testimony of W. W. Casey.)

completed inside or not. I don't think it was.

Q. You don't think it was in the process of construction?

A. I don't think it was completed inside. It was enclosed.

Q. Do you know whether the foundations had been put under it at that time?

A. Well, they generally build that as soon as anything, don't they?

Q. How's that?

A. They generally build that as soon as anything, don't they?

Q. I'm not asking you, Mr. Casey, what is generally done. I am asking you if you don't know that the foundations were not under there?

A. I don't know.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Ever see a house built first and the foundations last?

Mr. COBB—I object to that as irrelevant and immaterial.

Testimony of P. R. Bradley, for Defendants.

P. R. BRADLEY, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth the whole truth and nothing but the truth, testified as follows:

(Testimony of P. R. Bradley.)

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name, Mr. Bradley?

A. P. R. Bradley. [223]

Q. Where do you live? A. Juneau.

Q. What is your profession?

A. Mining engineer.

Q. How long have you been following that profession, Mr. Bradley? A. Twenty-six years.

Q. What qualifications do you have as a mining engineer?

A. I'm a graduate mining engineer from a well-known mining college.

Q. What college?

A. University of California.

Q. How long have you been following the profession? A. Twenty-six years.

Q. Now, are you familiar with the effect of the velocity of water in mountain streams? A. I am.

Q. And the erosive capacity of water?

A. Yes.

Q. Now, Mr. Bradley, how does the carrying or transportation capacity of water vary with its velocity?

A. It varies as the sixth power of velocity.

Q. As the sixth power of velocity.

A. Yes; that is to say, if you double the velocity of a stream, you would increase its transportive capacity by 64 times.

Mr. COBB.—How is that?

(Testimony of P. R. Bradley.)

A. If you double the velocity of a stream you would increase its transportive capacity by sixty-four times.

Q. Now, how does the erosive power of water vary with the velocity? [224]

Q. The erosive power of a stream will vary as the square of the velocity; that is to say, if you double the velocity of a stream, you will increase its erosive powers by four times.

Q. Can you just explain to the jury what is erosive power?

A. The erosive power is the scouring power—the power a stream has to scour the banks or the bottom. The transportive power is the power to carry the material after it has been scoured off.

Q. Now, have you had experience, Mr. Bradley, in the construction of bulkheads or flumes carrying streams? A. Yes.

Q. Now, I will ask you if, in your opinion, it would be a proper method of construction in constructing a flume or bulkhead to carry the waters of a stream like Gold Creek which flows into the waters of Gastineau Channel, to narrow the capacity or narrow the flume upwards, or narrow the flume at its mouth?

A. It all depends on the grade you gave the flume. If the flume has a greater grade than the stream, it doesn't need to have such a large cross-section at the bottom. As a matter of economy you could narrow it down and use less materials.

Q. What would be the object served in narrowing

(Testimony of P. R. Bradley.)

it? What would be the purpose of narrowing it, if any?

A. Well, the purpose of narrowing it would be to increase its velocity and thereby increase its transportive power to carry material away.

Q. Would it have any effect on its scouring power?

A. Yes; it would also have an effect on the scouring power.

Q. By narrowing it slightly, would it have a tendency to clear itself or not? [225]

A. Yes; it would have a tendency to clear itself.

Cross-examination.

(By Mr. COBB.)

Q. Mr. Bradley, I don't know whether I understood you or not. You say that if you increase the flow of water, speed of the flow, that it increases the quantity of water that will pass a given point by from four to six times?

A. No; I said nothing like that.

Q. What did you say about that? What would be the increase in the capacity of a stream?

A. I was speaking about the increase in the erosive power or capacity of a stream, or the transportive capacity of a stream.

Q. Before you got to that, you said its carrying capacity. What do you mean by the carrying capacity—the quantity of water that would pass—

A. (Interrupting.) No; I mean the capacity to carry material.

Q. Oh, the capacity to carry material? A. Yes.

(Testimony of P. R. Bradley.)

Q. What would be the increase in the capacity of a stream to carry a volume of water. Wouldn't it vary directly as the speed and flow?

A. Oh, yes; if you double the speed you would double the carrying capacity of the stream.

Q. Now, it wouldn't necessarily have to be—

The COURT. — (Interrupting.) You mean, double the stream, double the flow of the stream?

The WITNESS.—Yes; double the stream.

Q. Wouldn't it more than double the flow because of the lack of [226] friction in the center?

A. Oh, yes; those things would enter into it theoretically, but not practically.

Q. Well, as a matter of fact, you wouldn't have to double the cross-sectional area of a stream to double its flow, would you, on the same grade, other things being equal?

A. All things being equal it would practically amount to that. There are a few elements entering into it that would change it one way or the other, but it would be very hard to say, offhand.

Q. Now, Mr. Bradley, you speak about the erosive capacity of a stream. If a stream of water is flowing straight along, no impact—flowing straight along the banks, past them, as it were, there isn't much erosion then, is there?

A. Oh, it depends on the character of the bank. You might have a solid bank and you might have a loose bank, in which case the erosion on the bottom and sides is apt to be great. With a rocky bank and bedrock sides, the scouring would be imper-

(Testimony of P. R. Bradley.)

ceptible, but whatever scouring there was would be multiplied by four, if you double the velocity.

Q. How does that compare with the erosive power of a stream when the stream is directed against the bank, either directly or at an angle?

A. Well, the velocity of the water would be somewhat impaired if it were directed against—

Q. (Interrupting.) How is that?

A. I say, the velocity of the water would be somewhat—

Q. (Interrupting.) I'm not speaking about the velocity of the water, but I'm assuming that the velocity was the same, whether it was running a course directly and then turned and there was an impact against the bank, either at an angle [227] or directly. What is the difference, then, in its erosive power?

A. There is no difference in the erosive power. The erosive power varies as the square of the velocity, no matter in what direction it might be going.

The COURT—He means the erosive effect instead of erosive power.

Q. Is there any difference between the erosive effect of a stream being directed against a bank and being allowed to flow right past it?

A. Oh, yes; it gives the stream a chance to effect its full erosive power.

Q. The erosion is much greater when it is directed against it?

A. Yes; it would be. A stream has more chance then to work up to the limit of its erosive power.

(Testimony of P. R. Bradley.)

Q. Now, Mr. Bradley, you say that a flume, to carry the waters of a creek, should be narrowed at the outlet under certain conditions, as I understood you. What are those conditions?

A. Oh, I think I was asked a hypothetical question.

Q. Oh, you were asked a hypothetical question.

A. What considerations led up to the narrowing of a flume. I didn't say they should be.

Q. Didn't say they should be? A. No.

Q. Well, assuming that a flume is discharging into salt water there, and the tide ebbs and flows there, would you think under those conditions it should be narrowed in order to keep it clear?

A. Yes; if the water that is going through the flume carries any sediment. [228]

Q. If it carries any sediment.

A. It would be desirable to increase the velocity.

Q. The tide would have an arrestive effect—when the tide rises up into the flume it checks the current? A. Naturally.

Q. Naturally. Causes it to deposit whatever is coming down there during the period of high tide?

A. Naturally that would be deposited on account of the diminished velocity.

Q. Assuming a two per cent grade in a flume that runs across the delta—twelve hundred feet across the delta of a stream that discharges into salt water, and that the stream, at periods of high water, brings down debris of various kinds, such as logs and stumps and those things, I will ask you

(Testimony of P. R. Bradley.)

if, when you narrow it at its mouth, narrow your channel more than it is above, if it isn't very likely that, with all that debris that is coming down, if two or three or more logs or stumps get opposite each other, practically filling the width of the channel, when it gets to the narrower place it won't be pushed together to the sides and jam?

Mr. FAULKNER—Just a minute. We object to that as not cross-examination. It might be very interesting, but it is a matter for argument.

Mr. COBB.—No; he is testifying as an expert. That is the condition—

The COURT.—(Interrupting.) Objection sustained—not proper cross-examination.

Mr. COBB.—How is that?

The COURT.—Objection sustained. He wasn't asked about that.

Q. Well, I'll ask you then, did you take any such matters as [229] that into consideration in stating that this flume was properly constructed?

Mr. FAULKNER.—The same objection to that question.

The COURT.—Objection sustained.

Mr. COBB.—How's that?

The COURT.—He didn't state the flume was properly constructed.

Mr. COBB.—I believe he did.

The COURT.—You can go to the record.

Testimony of R. G. Day, for Defendants.

R. G. DAY, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Day, will you state your name?

A. Ray G. Day.

Q. Where do you live?

A. Eleventh and B Streets.

Q. In Juneau? A. Yes.

Q. How long have you lived in Juneau?

A. Since 1912.

Q. Were you in Juneau on the 26th of September, 1918? A. Yes, sir.

Q. Where were you that day, Mr. Day?

A. I was at the Empire office until about ten o'clock. After that I went out to the Casey-Shattuck Addition.

Q. How long did you say you lived in Juneau?

A. Since 1912.

Q. What time did you go out to the Casey-Shattuck Addition?

A. About ten o'clock in the morning. [230]

Q. You live at—

A. Corner of Eleventh and B.

Q. On the Casey-Shattuck Addition? A. Yes.

Q. I'll hand you a photograph marked Defend-

(Testimony of R. G. Day.)

ant's Exhibit No. 1, and ask you to mark with a lead pencil over the roof of your house, if it is shown.

The COURT.—Mark it D. There is one other mark there now.

Q. Mark it D, then.

(Witness does so.)

Q. Now, if you'll just point that out to the jury, too. Take the photograph and show to the jury just where your house was.

(Witness does so.)

Q. You say you went out to your house that day?

A. Yes; about ten o'clock—

Q. (Interrupting.) What time did you get there? A. About ten o'clock in the morning.

Q. Did you observe the creek at that time?

A. I did.

Q. What was the condition of Gold Creek when you arrived there? A. It was flowing all over.

Q. What do you mean by "all over"? Where?

A. Well, the water at the upper end started to go down Eleventh Street.

Q. Now, perhaps you can come down to this plat, Mr. Day, and show us on that.

A. Right in here (showing).

Q. Perhaps we can do it better on the photograph. Witness isn't familiar with the plat.
[231] You say water was going all over?

A. Yes.

Q. Did you see the cribbed channel, where the cribbing had been built? A. Yes; part of it.

Q. Now, what was the condition of that with

(Testimony of R. G. Day.)

reference to water? A. In what part?

Q. At the upper end. A. Yes.

Q. Was there water on the outside of the cribbed channel? A. Yes, sir; there was.

Q. On which side?

A. On the west side; at the upper end.

Q. Water on the east side, too?

A. Yes; a little farther down.

Q. Now, on the upper end, Mr. Day, what was the natural land in there above the cribbed channel; as the creek comes out under the Gold Creek bridge, what is the natural ground on the right-hand bank?

A. You mean on the west bank?

Q. Yes; on the west bank.

A. Natural ground, stumps, boulders.

Q. Permanent bank?

A. Yes; there was some willows in there, too.

Q. Was there any water going over that bank?

A. When I first got out there, there was.

Q. Was there any bulkhead there at that—I mean up at the upper end of the stream?

A. Well, right at the intersection of the channel and Eleventh Street, there was a bulkhead at that time. [232]

Q. From there on up there wasn't any.

A. My recollection is there wasn't any.

Q. Now, you say water was going over that?

A. It was going both over and under.

Q. You know where the Northern Laundry is?

A. Yes, sir.

(Testimony of R. G. Day.)

Q. Where was the water going with reference to that?

A. It was coming right down at right angles.

Q. Now, can you show the jury on that photograph where the water was going? Just bring it over to the jury please.

A. Here is the corner of the Northern Laundry; there is the tower (indicating). The extreme corner of the Northern Laundry runs out square, like that (showing). That's in the street—that tower. The bulkhead on the creek was further over (indicating) and the water had cut both over and under the cribbing and was running down Eleventh Street and across this way.

Q. How far up did that water start, that you show on that photograph?

A. Right here? Went right by the tower.

Q. What about the upper portion right here (indicating)? Did it cut in there?

A. I don't remember much about that.

Q. Does the picture show it?

Mr. COBB.—Well, that's a question the jury can see for themselves.

Q. Now, what did you do there that morning?

A. We got started at work on the west bank of the creek right away.

Q. What did you do? [233]

A. We tried to construct a temporary bulkhead.

Q. To keep the water from going where?

A. Keep it from going down Eleventh Street.

Q. That was on the west bank? A. Yes, sir.

(Testimony of R. G. Day.)

Q. And your home was on the west side?

A. Yes.

Q. How great a quantity of water was there over there around your home?

A. Well, it varied according to the time of the day.

Q. Well, from the time you arrived there, just describe conditions with reference to water?

A. It kept eating under—it kept getting worse until two o'clock in the afternoon. The high water was about two; between two and three.

Q. The highest water was between two and three?

A. That is, on that side; yes.

Q. What did you do there during the time that you were there?

A. The only thing we could do was to fill sacks full of cinders that we got from the cinder dump of the Northern Laundry, and put in brush in between.

Q. Did you assist in moving anybody's property?

A. Two of them; yes.

Q. Whose property was that?

A. One was in the Secrest house, directly across the street, and the other was in the Joe Kahrer house which was next door to the Secrest house.

Q. You helped move Billy Casey?

A. No; I wasn't down there.

Q. What is that? [234]

A. I wasn't down there.

Q. See anybody moving? A. Yes.

Q. Mr. Day, you observed the rainfall that day?

A. Yes.

(Testimony of R. G. Day.)

Q. And the condition of the waters in the creek?

A. Yes, sir.

Q. I will ask you if, within your memory, you have seen as high a period of water?

A. No, sir.

Q. Ever see as great a rainfall as there was on that day? A. No, sir.

Cross-examination.

(By Mr. COBB.)

Q. How long have you been here, Mr. Day?

A. Since 1912.

Q. You know of the high water in 1913?

A. I was out to Salmon Creek in 1913.

Q. You were up to Salmon Creek?

A. In the summer.

Q. You didn't notice the height of the water in Gold Creek that year? A. No, sir.

Q. Were you here in 1915? A. Yes, sir.

Q. How did that compare with the waters of 1918? A. Well, it wasn't near as much.

Q. It wasn't near as much? A. No. [235]

Q. Now, Mr. Day, was anybody's property on the west side of the creek damaged that day?

A. Yes, sir.

Q. Washed out?

A. You mean houses washed away?

Q. Yes. A. No, sir.

Q. What damage was done?

A. The damage—most of the damage was done to houses from the flood water and a lot of—in

(Testimony of R. G. Day.)

some places, there was from four to six inches of mud. The basements on most of the west side of the creek were flooded.

Q. What time of the day did that happen?

A. The highest water, that day, was between two and three o'clock is my recollection.

Q. Was it in the afternoon that the waters got so bad?

A. The water got worse in the afternoon.

Q. Got worse? A. Yes.

Q. Now, about opposite the Northern Laundry, where you speak about this high ground or permanent bank being washed out, the bulkhead had given way, hadn't it?

A. The bulkhead was undermined.

Q. Undermined? A. Yes, sir.

Q. Explain what you mean by that. Describe to the jury what you saw of that undermining.

A. Water was running both over the cribbing and it had eaten out under the cribbing. It was a log cribbing, filled with [236] rock in behind. It gradually ate under it until it was undermined, eating the ground out as it went, and finally the bulkhead went.

Q. Had the bulkhead given entirely away or been washed out?

A. The bulkhead stood there long after the high water.

Q. How is that?

A. The bulkhead was there long after the high water.

(Testimony of R. G. Day.)

Q. After the high water at that place?

A. Yes.

Q. But it had been undermined so a strong current could come under and cut out the bank?

A. It did; yes, sir.

Mr. COBB.—That's all.

Testimony of H. T. Tripp, for Defendants.

H. T. TRIPP, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Tripp, will you state your name please?

A. H. T. Tripp.

Q. Where do you live? A. In Juneau.

Q. How long have you lived in Juneau? .

A. I have made my home here since 1904.

Q. Were you in Juneau on the 26th day of September, 1918? A. No, sir.

Q. What is your business, Mr. Tripp, or profession?

A. I have always been in the mining business, hydraulicking and lode mining—mining work, generally. [237]

Q. Have you had any experience in the construction of flumes and bulkheads? A. I have.

(Testimony of H. T. Tripp.)

Q. In streams. Have you had any experience in this country?

A. I have had considerable in this country.

Q. Were you familiar with the flume that was constructed in Jualpa basin to carry the water of the creek over the springs of the Juneau Water Company? A. Yes, sir.

Q. Did you construct that?

A. Yes; it was my idea. It was presented to me. The situation was presented to me and it was my idea of how to remedy the condition that existed, and I was asked to take charge of the work, which I did.

Q. What was the condition up there? Well, I'll ask you, when did you do that work?

A. Well, I have forgotten whether it was in 1913 or '14. I don't remember now what year it was.

Q. What was the condition there before you did the work? What was there?

A. The condition was that there was a concrete flume that had been constructed to convey water over the flume—

Q. (Interposing.) Over the springs?

A. Yes; over the springs, rather, and the flood was undermining the walls of that concrete and digging out the floor of it, and the concrete structure was in such a condition that it was trembling and they were afraid that it was going to collapse, and that was at the time of a flood and something had to be done immediately in order to save it.

(Testimony of H. T. Tripp.)

Q. Now, you say the water was undermining it?
[238]

A. Grinding it underneath the rocks and debris coming down. The big rocks were cutting the bottom of the concrete flume and they had cut away on the edges of the corners underneath or at the bottom of the wall, all along on the line of the flume, on both sides, and also cut into the bottom of the concrete.

Q. And you say at the time you put in the lining that there was a period of high water?

A. There was high water and that was what was bringing down these rocks and debris that was doing the damage.

Q. What did you do there with reference to the construction of the lining?

A. Well, it was rather a complicated proposition to construct a flume or something that would save it at that time, during the flood—

Mr. COBB.—(Interrupting.) I think that I shall object to that as wholly irrelevant and immaterial. I don't know what the purpose is. This is another flume.

The COURT.—I'll hear from the other side.

Mr. FAULKNER.—If the Court please, I want to show the construction of that flume up there. The testimony is that it went out. I want to show how it was constructed, what it was put there for, the amount of lumber in it and the nature of the construction, and I want to show—

Mr. COBB.—The testimony is not that the flume went out.

Mr. FAULKNER.—No; the lining.

Mr. COBB.—The lining went out. What has that to do with it?

The COURT.—What is the purpose of it.

Mr. FAULKNER.—The purpose of it is to show the nature of [239] that construction, to show the capacity of it and to show what this flood did, as having a bearing on the question of whether or not this was an unprecedented flood. Mr. Tripp testified before, I think, the same way.

Mr. COBB.—On the first trial; not the last trial. The point is this: The fact that the lining went out there might be due to any one of various causes—might not involve the flood alone. It would require us to go in and try a side issue.

Mr. FAULKNER.—No; if the Court please—

Mr. COBB.—(Interrupting.) The mere fact that it went out may explain some of the lumber down there. To go into the construction of that flume and all that sort of thing, I think is wholly irrelevant and immaterial. It is an entirely different kind of flume from the one built below *where*, which did this damage.

The COURT.—I think I'll sustain the objection.

Mr. COBB.—Yes—

The COURT.—The only purpose that I could see would be to show the size of the lumber and the size of the debris coming down from that flume.

(Testimony of H. T. Tripp.)

That might become material to show the lumber that was found in the debris below.

Mr. FAULKNER.—I'll state to the Court that there will be testimony showing the stage of water in that flume on that day and the character. I want to show the character of the construction, and then show by other witnesses just what happened with reference to that construction during the day, and then show that it went out. Of course, the lumber naturally went down and the testimony already is that the flume went out. We have got that in the record already. But I [240] want to show the character of the construction and then the stage of the water—how much water had been in there before and how much was in there that day and what it was that took it out, as having a bearing on the character of the flood. That is the purpose of this phase of the examination. There is no way to get at the character of the flood except by that sort of testimony.

The COURT.—Well, I'll admit the testimony subject to being stricken out.

Q. Now, will you describe, Mr. Tripp, the construction of that lining, just briefly.

A. The structure had to be built during the time of the flood and consequently had to be built over the flood and be hung in the concrete flume. Consequently, there were long caps of eight by eight dimensions and then hanging from that to go down, within a foot or so of the running water, which was about half full—I think the concrete

(Testimony of H. T. Tripp.)

flume was running about half full of water—that whole structure had to be built and constructed so that it was one continual line of this flume. It was lined on the bottom and on the sides.

Q. What was on top?

A. On the top was a tie that ran clear through and it was all set up on posts, so that at the given time, why it would all be lowered into the water. It was fastened by cables.

Q. Now, across the top between the posts was there anything? A. What is that?

Q. Across the top of the flume?

A. Over the outside of each wall was a cable, and from that were posts running down temporarily until the flume would be lowered into its place.
[241]

Q. How was it fastened there?

A. By big cables.

Q. How much lumber was used there?

A. I don't remember exactly how much there was.

Q. Give us your best recollection?

A. Oh, I don't know; possibly thirty thousand, forty thousand. I don't know exactly what it was. I don't remember just how long it was. I know the cross-section of the flume was something like twenty feet, eighteen, twenty feet, or maybe a little more. I don't remember exactly.

Q. And you say you constructed that during a period of high water? A. Yes, sir.

Q. And it was *in year* 1913 or 1914?

(Testimony of H. T. Tripp.)

A. Yes, sir.

Q. Now, how high was the water in there at that time?

A. I would say it was about— The concrete flume was running about half full.

Q. About half full? A. Yes.

Q. Now, did you see the bulkheads that were constructed by the defendants in this case, across what is known as the Casey-Shattuck flats?

A. I have seen them.

Q. Did you see them at the time they were being constructed?

A. I was out there during the time of construction.

Q. Were you consulted about the method of construction?

A. I was out there and I was asked for my opinion as to whether or not that was suitable construction. I remember that well enough. [242]

Q. Now, in your opinion, as an engineer and as a constructor of flumes and bulkheads, was it proper construction?

A. I consider it good, suitable construction, as long as the timber would last. It was built of logs mostly.

Q. Now, Mr. Tripp, the testimony shows that the stream between the bulkheads was narrowed—the distance between the bulkheads was narrowed some four or five feet at the lower end where the stream goes out into the bay. I will ask you if,

(Testimony of H. T. Tripp.)

in your opinion, that was the proper method of construction of that bulkhead?

A. Well, that is generally considered good construction. It is good engineering as a general thing, and a matter of economy.

Q. What is the purpose of that?

A. Well, the general purpose of construction of a flume, or a way to convey water, is to keep the water confined in a certain channel; and it generally isn't any larger than it is calculated to carry the water, as a matter of economy generally.

Q. Now, if you have sand and gravel coming down a stream of that nature, what would be the effect upon that, if you have sand and gravel coming down and being deposited where possible, what would be the effect on that sand and gravel in the bottom of the creek, if you narrowed the sides of the creek?

A. Well, the more the water that is kept together, the better it is so long as you can confine it.

Q. Would it make the water flow swifter or slower if you narrowed it? [243]

A. It would have a tendency to make it flow swifter.

Q. Would it assist in keeping the bottom cleared out or not? A. Yes; it would.

Q. You say you weren't here on *November* 26, 1918?

A. No; I was at Eliza Harbor, looking over a power proposition.

(Testimony of H. T. Tripp.)

Q. Now, after you returned to Juneau, did you go up into the basin? A. Yes; I did.

Q. What did you observe there with reference to the structure you had built?

A. Found it all gone.

Cross-examination.

(By Mr. COBB.)

Q. Was the concrete gone?

A. No; the structure that I had put in.

Q. Just the lining— A. (Interrupting.) Yes.

Q. (Continuing.) Went out? The lining was all dropped in at one time?

A. Yes, sir; there were iron plates made to drop down in front of this at the time that this was to be launched, and there was a given distance for it to go down before it would come to its place, and when those aprons were dropped down in front, the water ran in on top of the flume and the water ran out of it and it settled to its place.

Q. Settled right down? A. Yes.

Q. What was the length of that flume?

A. I don't remember what the length was—two or three hundred [244] feet; maybe three hundred feet; maybe more; maybe less. I don't remember exactly.

Q. Do you remember the grade of it?

A. It was a steep grade. I don't remember what it was. In fact, I never took the grade of it.

Q. You never took the grade of it. You know it was very steep, though? A. Yes.

(Testimony of H. T. Tripp.)

Q. Water went through there a-whizzing?

A. You bet it did.

Q. Great deal steeper than the grade of the flats down here, where this bulkheaded channel was? A. Yes.

Q. Great deal steeper? A. Yes.

Q. And a smooth bottom? A. Yes.

Q. No rocks or gravel in there at all. Now, Mr. Tripp, were you employed to plan this flume down across the flats by the defendants or to give Mr. Casey an opinion; or was it a casual opinion given to a friend?

A. Well, I happened to be out there one time and I went over the proposition and we walked up and down the flume and went over the proposition.

Q. You were not employed? A. No, sir.

Q. Ever go over it more than once for the purpose of giving this opinion?

A. I don't think so; no.

Q. Did you take into consideration, in giving that opinion, and [245] the opinion you have expressed now, that the ends of the cross-pieces that bound the two walls of the bulkhead together, were left projecting into the channel?

A. Oh, I remember that there were, that there were pieces, short pieces, that were running out into the walls and that they came there and acted as a sort of a tie on the ends of the logs.

Q. Did you take into consideration the possible danger there might be from debris—one end of a log for instance—butting up against one end of

(Testimony of H. T. Tripp.)

those projections and the other end of the log swinging around and lodging against the other side?

A. I don't remember that there was anything that caused special consideration along that line. I don't think there was anything that was more than ordinarily noticeable in that regard.

Q. You didn't take into consideration a thing like that at all, that might happen to dam up the whole concern—throw the water all over the flats?

A. No.

Q. Instead of carrying it out through the stream?

A. I don't remember any such thought.

Q. Well, as a mining engineer, don't you know that there is danger of that happening in that kind of construction?

A. Yes; I know that there is always danger in that kind of a place.

Q. Yes. Mr. Tripp, you say that you think it is proper to narrow that kind of flume at its lower end where it goes into salt water?

A. Generally customary to narrow any flume where there is an increased velocity as it goes further down on a steep grade, why, it increases its speed and it isn't generally considered [246] necessary to have the flume so large.

Q. Suppose the grade isn't increased—running on the same grade?

A. Water will generally increase. It is hard to say definitely. Every proposition of that kind

(Testimony of H. T. Tripp.)

has to be considered by itself. I don't think there is any regular law for it.

Q. Well, if it is shown by the testimony that this flume runs out and discharges into the channel, into salt water, where the tide ebbs and flows, with that sort of an outlet, would you narrow it?

A. It wouldn't make any difference whether it was wide or narrow, with the tide coming in, and during the stage of high tide, why, of course, the current would be—

Q. (Interposing.) Checked?

A. (Continuing.) Checked; yes.

Q. And debris deposited?

A. It could, or would, of course, help to deposit it. It would clear itself, however.

Q. Clear itself to some extent as the tide went down? A. Yes.

Q. According to the volume and force of the water? A. Yes.

Q. But it wouldn't clear itself until the tide did go down? A. No.

Q. Now, then, Mr. Tripp, considering the nature of the watershed is such that, in times of high water or flood, such as this country is subject to, that stumps, trees and logs and timber would be brought down, I will ask you if there isn't danger, with debris of that kind coming down and if you have narrowed the mouth of the channel, that there would be a jam or wedge [247] formed at that narrow place—these logs and stumps and timbers all coming down together at one time and being

(Testimony of H. T. Tripp.)

pressed together and held that way by the constriction of this outlet, isn't that a danger?

A. It's a very hard thing to tell just what will happen in case of a flood. It might be and it might not be a danger. It might help clear it up and it might possibly be the means of causing a jam; but the more the water can be confined, so long as it carries within those confines, the more force and power there is to clear the deposits.

Q. Oh, I understand that, Mr. Tripp, but the question that I am asking you, you haven't answered yet. Would there, in the case that I put to you in the preceding question, wouldn't there be danger of debris that comes down in high water, such as stumps and timber, forming a jam at that narrow outlet?

A. If there was a place for the debris and rubbish to hang to, if there was a place for it to hang, I would say, yes; otherwise—

Q. (Interrupting.) Exactly.

A. If there was an increased speed, I would say that it would help to clear it.

Q. If a log— The channel above this outlet, we'll assume, is thirty feet wide. At the outlet it is twenty-five feet. If a log coming down there, twenty-seven feet long, or a piece of timber anywhere between twenty-five and thirty feet in length happened to get almost straight across the channel at the time it struck the narrow place, I will ask you what would likely happen? [248]

A. Naturally, if a log went down a place like

(Testimony of H. T. Tripp.)

that and happened to go so that it would be perfectly square across the stream or straight across the stream and it hit on two ends and had a chance to hang up, why it would naturally stop there.

Q. Naturally stop there? A. Sure.

Q. The more pressure there would be brought against it, the tighter it would jam?

Q. Yes; it would either be broken, or else it would stay there probably.

Q. And if two or three big stumps coming down there, or a whole flock of them, six or seven or eight feet through or more, and all should happen to get alongside of each other at that narrow place, wouldn't there then be danger of jamming?

A. There is always danger, Mr. Cobb, in a flood. It is hard to tell what might not happen.

Q. I am asking you as to its construction. Now, in giving your opinion that it was proper to narrow this flume at the lower end, did you take any of those things into consideration?

A. In connection with that flume?

Q. Yes.

A. I don't think I gave an opinion to that extent.

Q. Oh, you didn't give an opinion that that flume was—

A. (Interrupting.) No, I just walked along with Mr. Casey during that time that we talked about. So far as that channel is concerned, I had no hand in planning that flume out there, or waterway.

(Testimony of H. T. Tripp.)

Q. Did I understand you to answer counsel on the other side that [249] you thought that flume was properly constructed?

A. I thought that it was fairly well constructed; yes; and I say so now, so far as that is concerned.

Q. Say so now. Well, then, in giving that opinion to Mr. Casey, did you take into consideration these dangers that I have just mentioned, of jamming at the lower end, or a jam occurring by reason of these projections into the channel?

A. My opinion at that time—I'll state I didn't go into it sufficiently to take into consideration every detail. I was not employed as an engineer to plan that flume, and I just simply walked over a part of it. I don't think, at that time, that I saw the lower end of it.

Q. It's nothing unusual, Mr. Tripp—you have been here a long time, I believe you said—it's nothing unusual, in the case of high water in these streams here, for a lot of logs and stumps and timbers to come down Gold Creek, is it?

A. There is generally some—

Q. (Interrupting.) How is that?

A. Everything is cleaned out along the line generally when there is a flood. In ordinary high water stages, there is everything that can get into the stream, and when the stream changes its course, it generally brings down something more.

Q. Would naturally come down. The watershed up there is steep; steep banks and canyons all along up and down that stream? A. Yes.

(Testimony of H. T. Tripp.)

Mr. FAULKNER.—I object to that as not proper cross-examination.

Mr. COBB.—I think it shows the character—

The COURT.—Objection sustained. [250]

Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. Tripp, if where the outlet of this stream was narrowed, the lining was smooth, smooth lining in it, would that make any difference, in your opinion, as to whether it would clear itself or not?

A. Certainly would.

Q. Now, let me ask you one more question. Mr. Cobb asked you whether the velocity, or something to that effect, whether the velocity on a two per cent grade wouldn't be the same all the way down. Now, let me ask you this question: If you took a two per cent grade, or take a slope of any kind, and have water flowing down it, would the water flowing up at the upper end of the grade be as swift—would the flow be as swift as it would be at the lower end, if it was two per cent all the way down? A. No, it increases in velocity.

Recross-examination.

(By Mr. COBB.)

Q. Soon run dry, wouldn't it? A. How is that?

Q. So; if it kept increasing in velocity, it would soon run dry, wouldn't it? A. No.

Q. The whole stream?

(Testimony of H. T. Tripp.)

A. There are certain laws that govern those things.

Q. How is that?

A. The law of acceleration governs those questions. [251]

Testimony of Emil Gastonguay, for Defendants.

EMIL GASTONGUAY, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name?

A. Emil Gastonguay.

Q. Where do you live? A. At Thene.

Q. How long have you lived there?

A. Since the spring of 1914.

Q. What do you do? What is your profession or duties? A. Chief electrician—

Q. For what—what company?

A. Of the— In charge of the power division.

Q. Of what company?

A. Of the Alaska-Gastineau Mining Company.

Q. Where is their property?

A. Well, situated, some at Salmon Creek, Thane, Perseverance, Annex Creek, Carlson Creek.

Q. What is at Perseverance? A. Mine.

Q. And the company was engaged in mining?

(Testimony of Emil Gastonguay.)

A. Yes.

Q. How long have you been with that company?

A. Since the spring of 1913.

Q. Where is the Perseverance mine located with reference to Juneau? For the purpose of the record, just tell where it is located—how far from Juneau. A. Four miles. [252]

Q. In which—

A. (Interrupting.) Up Gold Creek.

Q. Gold Creek, near the head of Gold Creek?

A. Near the head of Gold Creek.

Q. Now, what did the company have at Salmon Creek?

A. They have the power installation at Salmon Creek,—dam, waterways and power plants.

Q. Flume up there? A. Flume.

Q. Where else do they have property?

A. At Thane and Annex Creek.

Q. What is at Thane?

A. At Thane is a milling plant.

Q. How far is Salmon Creek from Juneau?

A. Well, the creek itself is nearly three miles, but the power plant, lower power plant, is about two and three-quarter miles.

Q. In what direction?

A. That would be northwest.

Q. In which direction is Thane from Juneau?

A. That would be southeast.

Q. Where is Annex Creek?

A. Annex Creek is in Taku Inlet.

Q. How far from Thane?

(Testimony of Emil Gastonguay.)

A. Well, the beach line is nineteen miles, or eighteen and a fraction miles.

Q. Now, where do your duties take you? Where do you go?

A. All over the system, where power is used, generated or used.

Q. Where is power generated? [253]

A. Power is generated at Salmon Creek and Annex Creek.

Q. And used where—at the mine?

A. Used at the mine and the mill.

Q. Now, Mr. Gastonguay, did you, during the period you were employed—you are still employed by the Alaska-Gastineau? A. I am.

Q. During the period you were employed there, have you kept any weather records?

A. Yes; we kept precipitation data.

Q. Where?

A. Temperature and precipitation. At Salmon Creek, Thane, Perseverance and Annex Creek, and they were kept for a while at Carlson Creek, but that was discontinued.

Q. Over what period did you keep precipitation data at Perseverance?

A. That was kept from 19—started in 1914 and kept until the mine was closed down.

Q. Have you a record of the precipitation there.—daily precipitation at Perseverance?

A. Yes, I have the record which I copied for you.

Q. What was the greatest amount— I might

(Testimony of Emil Gastonguay.)

ask you, have you a record of the precipitation or rainfall at Perseverance on September 26, 1918?

A. Yes; that was the—

Mr. COBB.—(Interrupting.) Well, that's an answer to the question.

Q. What was that precipitation?

Mr. COBB.—I think I shall object to that. The period of time—only four years—is too short for purposes of comparison or showing that this was an unusual rainfall; or that it [254] was the act of God, as they claim.

The COURT.—Objection overruled. The testimony on this point might not be limited to the testimony of this witness; there might be other records kept during a longer length of time.

Mr. COBB.—Well, it will be admitted then, subject to being stricken.

Q. What was the precipitation at Perseverance on September 26, 1918? A. 7.4 inches.

Q. 7.4 inches? A. Yes, sir.

Q. And you say that was four miles from Juneau? A. Yes, sir.

Q. At the head of Gold Creek? A. Yes, sir.

Q. Now, Mr. Gastonguay, what is the highest record—what is the highest precipitation or rainfall during any other twenty-four hour period, within your records at Perseverance?

A. Well, this was the highest.

Q. I mean the next highest?

A. The next highest was in that same year; that same year, 3.4 in May, May 28.

(Testimony of Emil Gastonguay.)

Q. What year? A. That's 1918.

Q. Three and what did you say? A. 3.4.

Q. What was the next highest before that?

A. Well, there are several that run close to that.

There's [255] 2.6—two of those; 2.65, 2.71—

Q. What did you say that one was in May, 1918? I didn't get that exact.

A. May, 1918, was 3.4.

Q. 3.4. Those other high periods that you mentioned, in what years were those?

A. Well, there's 1916, 1917 and 1918.

Q. You covered the whole period? A. Yes.

Q. Covered the high points of the whole period?

A. Yes.

Cross-examination.

(By Mr. COBB.)

Q. No particularly high water in 1915? What does your record show as the highest in 1915?

Mr. FAULKNER.—There is one other question I want to ask you. Mr. Gastonguay, where were you on September 26, 1918? Where were you yourself. A. On September 26?

Q. Yes.

A. I was at Thane in the morning and then came to Juneau, went—crossed Gold Creek, went to our switching tower and then went out to Salmon Creek about noon and was out there until late that evening.

Q. Did you observe the waters of Salmon Creek

(Testimony of Emil Gastonguay.)

that day? A. Yes; made a record at Salmon Creek.

Q. Did you personally observe it?

A. No; not personally.

Q. I mean, on the way out, you saw it, didn't you? A. Yes. [256]

Q. Now, you have seen it before?

A. Oh, yes; I have seen it whenever we had any trouble there.

Q. Did you ever see the water as high as it was on that day? A. No.

Mr. COBB.—We object to that as irrelevant and immaterial; too short a period of time. The testimony shows that during this period there was no particularly high water.

The COURT.—Objection overruled.

Q. Now, Mr. Gastonguay, on September 26, 1918, did you observe any destruction caused by the rainfall or the flood in Gold Creek, or in Salmon Creek? A. Yes; at both places.

Q. Now, I will ask you, first, what was done at Salmon Creek?

A. Well, at Salmon Creek, we had a washout from one of the side forks, which took out a dam which impounded a forebay close to No. 2 power house, and washed out the flume in two places and took out the track, the tramway in two places.

Q. Did you have any other trouble anywhere else from slides or washouts that day?

A. Yes, we had trouble with our lines, too, and we had a washout at Thane.

(Testimony of Emil Gastonguay.)

Q. Did you observe any slides or washouts between Juneau and Salmon Creek?

A. Yes; there were several of them.

Q. Now, how did the damage done that day compare with anything else that you have ever experienced?

A. Well, there was considerably more on that day. It was practically universal around here, over the system. [257]

Q. The damage? A. Yes.

Cross-examination.

(By Mr. COBB.)

Q. Whole town was wiped out?

A. Beg pardon?

Q. Whole town was wiped out?

A. Whole town?

Q. You said it was universal—the destruction around here was universal, as I understood you.

A. No; the damage.

Q. Oh. The whole town damaged?

A. Not that I know of. There was considerable damage in town, though.

Q. It wasn't universal then? A. Well, no.

Q. In this region of the country around here—Gold Creek, Salmon Creek, Thane—it's nothing uncommon to have more or less trouble with high water in flumes, is it, or slides or washouts?

A. Well, it's not a regular occurrence.

Q. No; it isn't regular, but it's not uncommon, is it?

(Testimony of Emil Gastonguay.)

A. Well, that all depends on what you call uncommon.

Q. Well, don't you have a great deal of trouble at every period of high water, with some one of the flumes, or something or another, connected with your mining operations?

A. Not, at every period; no.

Q. How is that?

A. Not at every period; no.

Q. Is that the only time you ever had any trouble?

[258] A. No; it is not.

Q. Great number of times? A. Yes.

Q. In other words, the region back of Juneau which feeds these streams is exceedingly precipitous? A. Yes.

Q. Very rapid run-off? A. Yes.

Q. In a few hours a heavy rain will run right off and cause high water in the streams, won't it?

A. Well, no exceedingly high water in a few hours that I have ever noticed.

Q. That you have ever noticed. Well, have you ever observed that at times when there is snow up back near the heads of these streams, in the fall of the year, whether or not when the snow is carried off by the rain— A. (Interposing.) Yes.

Q. (Continuing.) that it would increase the height of water in the streams? A. Yes.

Q. So that the height of water might not depend altogether upon the amount of rain?

A. Not altogether; no.

Mr. COBB.—That's all.

Testimony of George Oswell, for Defendants.

GEORGE OSWELL, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth; the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.) [259]

Q. Will you please state your name?

A. George Oswell.

Q. Where do you live? A. At the Ebner mine.

Q. Where is the Ebner mine?

A. About a mile and a half up Gold Creek.

Q. From Juneau? A. Yes.

Q. How long have you lived there?

A. Since January, 1914.

Q. What is your business?

A. Mine superintendent.

Q. Where is your residence situated with reference to Gold Creek?

A. My residence is right at the mine within two or three hundred feet of Gold Creek.

Q. Were you at the mine and at your residence on September 26, 1918? A. I was.

Q. Did you observe the rainfall and the water in the creek on that day? A. I did.

Q. Did you observe any damage that was done on the creek that day? A. Yes, sir.

Q. When did you first observe the period of high water that morning?

A. As soon as I got out in the morning.

(Testimony of George Oswell.)

Q. What time would that be?

A. Oh, about six o'clock; six-thirty.

Q. What was the condition of the creek at that time? [260] A. It was high.

Q. What did you do after that?

A. Well, I didn't do much until the men came on to go to work at seven o'clock; and the blacksmith who lives in town, coming up to work that morning, reported that there was danger of the Gold Creek flume going out; that the concrete flume would not carry the water or the flow of the creek at that time.

Q. You mean the flume of the water company?

A. Yes.

Q. How far is that from your property?

A. Oh; it's about halfway between Juneau and the property.

Q. Now, did you come down there that morning?

A. I did.

Q. What did you—

A. (Interrupting.) About eight-thirty.

Q. What did you observe down there at that flume at that time?

A. Well, I observed that the flow of the creek was larger than the flume would carry, and it was spilling over.

Q. What was the construction of that flume? What was inside of it?

A. Why there was timber lining inside of the concrete walls.

Q. What was on top of it?

(Testimony of George Oswell.)

A. Nothing but girders or beams across, you know—spreaders for the timber lining.

Q. There was timber beams across?

A. Yes; about eight by eight, six by eight, or some such size.

Q. How were they fastened?

A. They were anchored by cables. [261]

Q. How long is that flume, Mr. Oswell, do you know? A. Approximately 240 to 50 feet.

Q. And about the width?

A. About 16 by 18 feet wide.

Q. How deep?

A. At the lower end the walls are about six feet, I would judge, and the upper end probably ten feet.

Q. Now, where did you go from there, Mr. Oswell? A. I returned to the mine.

Q. Did you come back down to the flume or down toward town again that day?

A. I was down at the flume again along after lunch.

Q. What did you observe then?

A. A similar condition.

Q. Water higher or lower?

A. Just about the same spilling over.

Q. And was anything coming down?

A. Timbers.

Q. Anything else? A. Stumps, timbers.

Q. Now, then, did you come down again that day?

(Testimony of George Oswell.)

A. Yes, I was down later in the evening, about four or five or four-thirty.

Q. What did you observe with reference to the flood then, when you came down in the evening?

A. The water had diminished some and the timber lining of the concrete flume had gone out.

Q. Did you observe any other signs of destruction or washouts on the road between your place and there?

A. Yes, the old bridge that was alongside the present bridge [262] on Gold Creek had gone out.

Q. And did you observe anything with reference to the road—any damage to the road?

A. Down near the town the roadway was gone out for a length of about ninety feet long.

Q. Above that did you observe any signs of damage at that time or later?

A. The Ebner flume and two bridges—the Ebner dam and two bridges along above the Ebner dam, had gone out; also there were gaps in the Ebner flume.

Q. Did you observe the road in the vicinity of what is called the Red Mill, in the basin?

A. Yes.

Q. What happened there?

A. Oh, the road was washed out entirely—the map of the whole creek changed.

Q. Where did the creek change? In what respect did it change?

A. Oh, it formed a new channel further to the northeast.

(Testimony of George Oswell.)

Q. And did you come down to town that day?

A. I did. I came down that night about nine o'clock.

Q. Came down town about nine o'clock?

A. Yes, sir.

Q. What was the condition here in town that night?

A. The town was in darkness. There was no lights here in town that night.

Q. Now, how long have you been at the Ebner Mine? A. Since January, 1914.

Q. Have you observed conditions on the creek during that period? A. Yes, sir.

Q. Did you ever see the water so high? [263]

A. Never before or since.

Q. Did you ever experience as great a rainfall as there was on September 26th?

A. No, sir; according to the records, there had never been so great a rainfall.

Mr. COBB.—We object to that and ask to have the answer stricken out as hearsay.

Q. From your observation, Mr. Oswell?

A. Never saw a larger rainfall.

Cross-examination.

(Mr. COBB.)

Q. You only had four years' observation?

A. Huh?

Q. I say, you only had four years' observation?

A. Yes; I have had nine, now.

Q. Nine now? A. Yes.

(Testimony of George Oswell.)

Q. And there hadn't been any since that—you wouldn't undertake to say that within the last twenty-three years there hadn't been periods of water as high? A. I can't go beyond 1914.

Q. This flume that you speak of, up in the basin, Mr. Oswell— A. Yes.

Q. The flume didn't go out itself—just the lining?

A. The concrete flume, no, is there to-day.

Q. Is there to-day. And this little bridge that you speak of that had been practically abandoned because its abutments were undermined, and a new bridge built?

A. Yes, there has been a new bridge built.
[264]

Q. And this flood simply completed the work of undermining the abutments of the old bridge?

A. It wasn't undermined.

Q. How's that? A. It wasn't undermined.

Q. Hadn't it been abandoned because it was being undermined?

A. It was used right along, more or less, that old bridge—wasn't undermined. The cribbing is there to-day.

Q. But because of its condition a new bridge had been built? A. Yes.

Q. Hadn't it. A. Yes.

Q. Before this flood? A. Yes.

Q. That new bridge didn't go out, did it?

A. No.

Q. You say that when you got down here that the town was in darkness? A. It was.

(Testimony of George Oswell.)

Q. How long did that remain in that condition?

A. I don't know.

Q. How long did you stay in town?

A. I was in overnight. I came in for safety that night.

Q. Now, Mr. Oswell, it's no uncommon thing to have slides up in the basin and injure the roads up there, is it? A. We have slides occasionally; yes.

Q. Have them most every time there is a considerable rainfall, don't you?

A. Oh, yes; we have had them.

Q. Yes. [265]

A. Several times.

Q. The roadway you speak of about going out up there, wasn't carried out by Gold Creek?

A. What is that?

Q. The roadway you speak about going out about ninety feet, that was taken out by a slide off the mountainside, wasn't it? A. Yes.

Q. And not the waters of Gold Creek?

A. Yes.

Q. You say it was?

A. Not by Gold Creek—no, no—by a slide.

Q. By a slide. A. Yes.

Testimony of George Dull, for Defendants.

GEORGE DULL, called as a witness for the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of George Dull.)

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you state your name, please?

A. George Dull—R. Dull.

Q. Where do you live?

A. George R. Dull.

Q. Where? A. George R. Dull.

Q. I say, where do you live, Mr. Dull?

A. Juneau.

Q. How long have you lived in Juneau?

A. Over twenty-five years. [266]

Q. What is your occupation?

A. I'm looking after the water system.

Q. In charge of the water—

A. (Interrupting.) Yes; for the city.

Q. Before that, what were you doing? How long have you been in charge of the water system?

A. Over six years.

Q. Before that what were you doing?

A. Carpentering and mining.

Q. Did you mine in Jualpa basin?

A. Yes, sir.

Q. Where is Jualpa basin?

A. Right up outside the city, going up the basin, going up to—

The COURT.—(Interrupting.) What creek?

The WITNESS.—Gold Creek.

Q. Does Gold Creek flow through it? A. Yes.

Q. Gold Creek flows through it.

A. Uh-huh.

(Testimony of George Dull.)

Q. What kind of mining did you do there?

A. Drove a tunnel.

Q. What kind of mining was it you were doing there—placer mining or—

A. Placer mining; yes.

Q. Did you have a flume there at any time?

A. Yes; there was a big flume built up there.

Q. When was that built?

A. I don't remember the year.

Q. About how long ago, Mr. Dull, if you know?
[267]

A. About—maybe about eighteen, nineteen years ago, I think.

Q. Now, did the water company have a flume up there? A. Yes, sir.

Q. Where was that?

A. Right this side of the basin.

Q. Up Gold Creek? A. Yes, sir.

Q. What was that built for?

A. To carry the water across the springs.

Q. Waters of Gold Creek? A. Yes.

Q. And the springs is where you get your water supply from? A. For the city; yes.

Q. For the city. A. Uh-huh.

Q. Were you up in the basin, on the banks of Gold Creek on the 26th of September, 1918?

A. Yes, sir; I was.

Q. What did— What time did you go up there?

A. Oh, about half-past eight or nine o'clock, around there.

(Testimony of George Dull.)

Q. In the morning? A. Yes.

Q. Did you have any trouble that day with the waters, flood conditions? A. Yes.

Q. What happened?

A. Oh, our flumes went out in the basin.

Q. Did the big flume that you speak of, go out?

A. No; the big flume didn't go out.

Q. Well, I mean the lining of it. [268]

A. Small flumes went out.

Q. Well, the timber lining of the big concrete flume, I mean.

A. The lining went out of the big concrete flume; yes.

Q. What about your small flume?

A. The big pipe-line to the reservoir went out.

Q. Did that go out? A. Yes, sir.

Q. Did anything happen to the road between here and your property out there?

A. Well, there was a slide.

Q. Did the road slide off? A. Yes.

Q. About how far?

A. Oh, maybe a hundred feet, I don't know. I never measured it.

Q. What caused it? What caused the road to slide? A. Landslide came down the hillside.

Q. Do you know what caused that?

A. Well, I suppose the rain.

Q. What other damage was done in there that day?

A. Took the low-pressure bridge out across the creek.

(Testimony of George Dull.)

Q. Did you see the waters of the creek that day?

A. Yes.

Q. What did you see in them, if anything, come down the creek? A. Oh, lots of timber.

Q. Stumps? A. Yes.

Q. Mr. Dull, I will ask you if, in your experience of twenty-five years, you have been acquainted with that basin and Gold Creek in all that time?

A. I have been up there often; yes. [269]

Q. Did you ever live up there? Did you ever live in the basin?

A. No; I never lived there.

Q. Where do you live now?

A. I live right this side on the basin road.

Q. On the basin road.

A. Where the big reservoir is.

Q. Did you ever see as high water in Gold Creek as there was that day? A. No, sir; I did not.

Q. Did you ever see as great a rainfall as there was here that day at any time within your memory?

A. I don't believe I did; no.

Q. Mr. Dull, you live almost in sight of Gold Creek? A. Yes.

Q. And your duties take you up there every day, do they?

A. Well, I don't go up there every day.

Q. Not every day, but your duties are connected with the flow of water up there, are they?

A. Yes, sir.

Q. And in your mining did you observe the creek at that time, in your placer mining?

(Testimony of George Dull.)

A. Well, one summer I worked up there in the basin.

Q. Your father was engaged in mining up there, wasn't he?

A. Yes; he worked up there, too.

Cross-examination.

(By Mr. COBB.)

Q. Prior to the time that you became connected with the water works, six years ago—that would be 1917 or 1916— When did you first begin to be connected with them, did you say—six years ago? [270]

A. Six years ago on the first of September last.

Q. That was in 1917.

A. Yes. 1916, ain't it?

Q. Or sixteen, I should say. Now, prior to that time, you didn't have any particular occasion to observe the high water in Gold Creek all the time?

A. Well, while I was running the tunnel for the Last Chance Gold Mining Company, I worked right down at the creek.

Q. When you were running the tunnel for the Jualpa Gold Mining Company? A. Yes.

Q. What year was that? A. What?

Q. What year was that?

A. That was in the fall of '98, '99, 1900.

Q. Those three years A. Yes.

Q. Now, outside of those three years and the six years that you have been connected with the water company, you have never had any particular oc-

(Testimony of George Dull.)

casion to watch the creek to see how high it was?

A. For four years then I was working for Lewis.

Q. How is that?

A. For four years, then, I was working for Lewis.

Q. For four years then?

A. Then, too; yes, sir.

Q. Well, outside of that, did you ever have any—

A. (Interrupting.) No.

Q. (Continuing.) Particular occasion to observe the height of the water? [271] A. No.

Q. You wouldn't undertake to tell the jury that it might not have been as high since you have been here and you did not observe it, would you?

A. No; I don't think it was; I don't think it was as high any time since—

Q. (Interrupting.) You don't think it was, but you don't know. Do you know it wasn't?

A. Yes, I know it wasn't.

Q. Were you here in 1913? A. Yes, sir.

Q. Where were you in that year during the period of high water?

A. There wasn't none so very high then.

Q. How is that?

A. There wasn't none so very high then.

Q. Well, where were you? A. I was here.

Q. Whereabouts? Did you go up the creek?

A. No, I was right here in Juneau.

Q. In Juneau? A. Yes.

Q. Did you go out to the creek during the high

(Testimony of George Dull.)

water that day? A. Well, I live right up there.

Q. How is that?

A. I live right near the creek.

Q. Do you know whether you were here or not?

A. I was home all the time here.

Q. Don't recall that high water in 1913 at all? A. No, not in particular.

Q. So, when you said that the 1918 flood was the highest, you [272] *you* didn't recall the flood of 1913 at all? A. No, only 1903.

Q. 1903—

A. (Interrupting.) And 1918 was the two highest waters we had since I came to Juneau.

Q. Since you recall? A. Yes, sir.

Q. In your mind, however, you didn't recall the flood of 1913 at all and don't recall it now, do you?

A. No, I don't remember seeing any real high water then.

Testimony of John Reck, for Defendants.

JOHN RECK, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Reck, will you please state your name?

A. John Reck.

Q. Where do you live? A. Juneau.

Q. How long have you lived in Juneau?

(Testimony of John Reck.)

A. Twenty-four years

Q. What are you doing now?

A. President of the First National.

Q. How long have you been President of the First National Bank? A. Since 1915.

Q. And prior to that time what was your business? A. Meat market.

Q. Which meat market?

A. Alaska Meat Company. [273]

Q. How long were you connected with them?

A. The Alaska Meat Company, I have been connected with them since 1900.

Q. During the period from 1900 to 1915, did the Alaska Meat Company have any structure on Gold Creek?

A. They did have a slaughter-house on Gold Creek.

Q. Had what? A. Slaughter-house.

Q. Where was that?

A. Right down on the flat, right over where Mr. Saum lives now; right in that neighborhood.

Q. Below the Gold Creek bridge that goes to the cemetery? A. Several hundred feet below.

Q. Several hundred feet below? A. Yes.

Q. Did you have occasion to go to that place frequently? A. Oh, yes; lots of times.

Q. Were you in a position to observe the waters of Gold Creek during that period? A. Yes, sir.

Q. 1900 to 1918. And did you see the waters of Gold Creek on September 26, 1918?

A. I did.

(Testimony of John Reck.)

Q. Did you see the flood conditions that day?

A. Yes, sir.

Q. I will ask you if, within your experience of 24 years, you have ever seen as great a flood in the stream as there was that day?

A. No, sir.

Q. And you observed the rainfall on that day?
[274]

A. Well, I naturally did. I was superintendent of the waterworks at the time, and am still, and I did observe the creek that day.

Q. How long have you been connected with the waterworks? A. Since 1915.

Q. Since 1915. And have you ever seen as great a rainfall within your residence in Juneau as there was on September 26, 1918? A. No, sir.

Q. Did you observe the damage that was done in 1918, September 26, on what is known as the basin road, that bank of Gold Creek? A. I did.

Q. What occurred there?

A. About eight o'clock in the morning Mr. Os-
well called me by phone. He says, "You better go
up the basin; your flume is going out—"

Mr. COBB.—I think I shall object to that. He
has proved that the lining went out—if that's all
you want to prove.

Mr. FAULKNER.—No; I'm asking about the
road.

Mr. COBB.—I shall object to any more evidence
on that. It has been proved that a lot of slides

(Testimony of John Reck.)

came down the mountains. I think that has been sufficiently proved.

The COURT.—You practically admit that there was?

Mr. COBB.—That there was slides came down?

The COURT.—Yes.

Mr. COBB.—Yes.

Mr. FAULKNER.—Is it admitted that they were the greatest slides that had ever occurred?

Mr. COBB.—Why, no; there was one slide that came down a [275] a number of years ago that was bigger than any slide that ever occurred up there.

The COURT.—You want to prove that that was the greatest slide that ever occurred?

Mr. FAULKNER.—No.

The COURT.—You simply want to prove that there were slides up there?

Mr. FAULKNER.—Oh, yes. I want to show that nothing had occurred—

The COURT.—Yes.

Q. Did you observe the damage done on the road that day? A. I did.

Q. Did you go up there that day?

A. I went up about nine o'clock.

Q. What was the condition of the road?

A. The condition of the road at that time was all right, but the flume was overflowing and the timber commenced to gather at the upper end; that is, the timbers across the flume. I could see that there was no chance of doing anything; so I came back,

(Testimony of John Reck.)

back down. Later in the day I went up again, in the afternoon, when the slide had occurred, and the road and the flume had gone out. There was a slide on the other side came down and took the electric light company's flume out, piled it up against our cement flume. I went up there to see if we could do anything, but there was no chance. Our water main was gone, too; so there was no use of going any further.

Q. Water main was broken in two? A. Yes.

Q. Shut off the supply of water in Juneau?
[276] A. Yes, sir.

Q. What was the condition of the road?

A. Well, I had to go over about 150 feet or so on the hillside. There was no road at all and I had to go out on the bank.

Q. There was no road at all? A. No.

Q. Had you been up Gold Creek frequently before that? A. Yes.

Q. Up that road? A. Yes.

Q. Had you ever seen such damage done there before? A. No, sir.

Cross-examination.

(By Mr. COBB.)

Q. Do you recall the big slide that occurred there some years ago, that covered up the road for three or four hundred feet?

A. I remember that a lot of— That was farther up.

Q. How is that?

A. That was farther up. I remember that well.

(Testimony of John Reck.)

Q. Wasn't that a bigger slide than anything that occurred in September, 1918?

A. It was a bigger slide; bigger body of ground came down.

Q. Yes.

A. But this time, there was slides both ways. There was one came the other side and took the largest flume out and also took the concrete flume out and another one came this way and took the road out.

Q. Slides up in that basin, everywhere along there, are very common, aren't they? [277]

A. They have been occasionally; yes. That's not the first time.

Q. How's that?

A. That's not the first time that they had a slide.

Q. And that wasn't the last time, either. There have been slides since then.

Mr. FAULKNER.—Oh, just a minute. We object to any questions as to what happened since then.

Mr. COBB.—That shows the character of the country.

The COURT.—Yes; objection overruled.

Q. They have occurred since, haven't they?

A. Small ones.

Q. Is that the only time that your watermain up there was broken by a slide? A. Yes, sir.

Q. That was the only time—

A. (Interrupting.) Yes.

Q. Since you have been connected with it?

(Testimony of John Reck.)

A. Yes, sir.

Q. You don't know but that it may have been broken before?

A. It's never been broken since I have been in the country.

Q. How is that?

A. We always had water since I have been in town.

Q. Don't you know that your watermain up there has been broken by slides several times and had to be replaced?

A. You're wrong, because the flumes used to be along on the top there and the water used to get dirty and Mr. Bishop put them under; buried them. That was only a few years before I took charge.

Q. That flume was broken by a slide and not by the water?

A. No, by the waters of the creek. [278]

Q. Where did that occur?

A. About, I should say, a thousand feet below the flume—

Q. Below the flume?

A. Just at that bend, where the road bends around this way, and there is a hole in here (indicating), and the bottom end lays right out at the bottom of the creek there.

Q. You don't know whether that wasn't caused by something getting in there and making a swirl?

A. No; it was washed out.

Q. Washed out? A. Yes.

Q. Now, Mr. Reck, prior to the time that you

(Testimony of John Reck.)

were connected with the waterworks, did you have any particular occasion to notice the height of the water in Gold Creek?

A. I used to go to the slaughter-house.

Q. How is that?

A. I used to go to the slaughter-house. We used to get some high water out there.

Q. At your slaughter-house? A. Yes.

Q. That sat right immediately on the banks of the creek? A. Yes, sir.

Q. So that you could throw—

A. (Interposing.) Yes.

Q. (Continuing.) The waste from it right out into the creek? A. Yes.

Q. And high water would naturally—

A. (Interposing.) Would notice it.

Q. (Continuing.) Be right up to the house. It was only a few feet above the level of the creek?
[279] A. Yes, yes.

Q. Now, prior to that time there were no buildings down on the flats?

A. No; there was nothing down there excepting the dairy barn.

Q. Nothing to produce any alarm over high water other than that it might injure the corner of your barn.

A. There was another barn a little farther up. The Frye-Bruhn barn was just a little farther up.

Q. Do you recall now all the high water, the various periods of high water that you have seen in Gold Creek? A. No, I couldn't.

(Testimony of John Reck.)

Q. You couldn't?

A. That would be impossible.

Q. So that you mean to tell the jury that so far as your recollection goes and impressions made upon you, you think that the September, 1918, flood was the highest water there was?

A. Highest water I ever saw in Juneau.

Q. You wouldn't undertake to say that it was the highest water since you have been here?

A. Yes, sir; I'm positive of that, because I went down to other floods just to see them.

Q. Have you been in Juneau constantly for twenty-four years?

A. Yes; with the exception of a week or two that I might go to Seattle and come right back.

Q. Do you recall the exact dates that you were gone to Seattle? A. No, sir.

Q. Do you know whether there was any high water here when you were down there or not?

A. I don't know.

Q. You don't know? [280] A. Yes.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. Reck, did you ever observe any damage done when you returned from Seattle?

A. No, sir.

Testimony of B. M. Behrends, for Defendants.

B. M. BEHREND, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Behrends, will you state your name?

A. B. M. Behrends, Juneau, Alaska.

Q. How long have you lived in Juneau?

A. Since 1887.

Q. What business are you engaged in?

A. Merchandising, banking.

Q. Merchandising and banking. Were you in Juneau on September 26, 1918? A. I was.

Q. Did you observe the flood conditions on that day? A. Yes.

Q. At Gold Creek. Were you out on Gold Creek that day? A. Yes.

Q. In the Casey-Shattuck flats? A. Yes.

Q. Did you observe the damage done there?

A. Yes. [281]

Q. Were you there after the waters subsided?

A. Yes, sir.

Q. The next day?

A. Yes, I was there the next day.

Q. Did you go over the ground out there?

A. Yes.

Q. Did you observe any other damage done on that day in Juneau? A. Yes.

(Testimony of B. M. Behrends.)

Q. Where was that?

A. On Gastineau Heights.

Q. What was done there?

A. The Williamson cottage and Walter Bathe cottage and the Gillen cabin smashed down.

Q. Washed out? A. Washed down.

Q. Did you observe any damage done to the Gastineau Hotel? A. Yes.

Q. What was done there?

A. Well, the Bathe house, I think, was thrown against the Gastineau Hotel which caused the flood in the hotel; water coming out of the front door.

Q. Water came through the hotel and out the front door?

A. Water ran through the Gastineau Hotel and out into the street.

Q. Did you also go over that section of the town after the flood? A. Yes.

Q. The next day or two? A. Yes.

Q. Now, I will ask you if, within your residence in Juneau you have seen as high water in Gold Creek as there was on that [282] day?

A. I have not.

Q. Have you observed Gold Creek at periods of high water before this flood?

A. Yes, I think I have.

Q. Did you ever see as much destruction or damage caused by the high water before, or rainfall? A. No.

Q. Now, Mr. Behrends, how long had those

(Testimony of B. M. Behrends.)

houses that you speak of, been on Gastineau Heights or Swede Hill?

A. Well, the Bathe house, I presume, hadn't been there more than—

Mr. COBB.—(Interrupting.) Speak a little louder.

The WITNESS.—I presume the Bathe house hadn't been there more than five or six years, and Williamson's house, I understood, had been there for a long time, as long as I can remember almost, and the Gillen house had been there a long time.

Q. How about the other house? Did you know Mr. Caro's house? A. Yes.

Q. How long had that been there?

A. That has been there a long time.

Q. Twenty years?

A. Yes; I would say it had been there that long.

Q. Now, Mr. Behrends, had you ever seen slides before that day in Juneau?

A. On that particular day, before?

Q. No; any time before that, in your memory?

A. Yes.

Q. Did you see anything as great as the slides and waterfall [283] on that day? A. No.

Q. Did you see as great a rainfall as there was on that day? A. No.

Cross-examination.

(By Mr. COBB.)

Q. Have you seen slides come down on Swede Hill and Gastineau Heights, as it is sometimes called, in which houses smashed down before?

(Testimony of B. M. Behrends.)

A. Yes.

Q. That is a very steep hillside, mountainside, isn't it? A. Yes.

Q. And it is essentially subject to slides?

A. It is.

Q. Isn't it? A. It is; sure.

Q. You say you are a merchant and banker. Prior to the time that the flats were built over, after 1913, that is, the Casey-Shattuck Addition, what was there to occasion your going out to see the height of water in the creek, if anything?

A. You mean on that particular day?

Q. How's that?

A. You mean on that particular day or before that?

A. No; any time before that, before these houses were built out on the Casey-Shattuck flats, there wasn't any building around there that would be likely to be injured by high water in Gold Creek?

A. No; we used to go out there for walks—Mrs. Behrends and I. [284]

Q. Would you take your walks out in a heavy rain? A. Yes; quite often.

Q. At a time of high water and flood?

A. Yes, we would take walks out there; yes, indeed.

Q. Did you know every time that there was high water? A. Not every time.

Q. What I am getting is, what was there to make it of any particular interest to you to go out and

(Testimony of B. M. Behrends.)

look at the creek and observe the height of the water, prior to 1918? A. There was none.

Q. Nothing at all? A. No.

Q. That day there was a particular reason for your going out there?

A. Yes, it was extraordinary; that is why we went out there.

Q. Now, do you recall all the high waters since you have been in Juneau?

A. I wouldn't like to say that I seen them all.

Q. How's that?

A. I wouldn't like to say that I seen them all.

Q. You wouldn't say that you saw them all. There may have been some very high water here that you didn't go out to the creek to see at all?

A. Might be.

Q. How is that? A. Might be.

Q. Did you see the creek during the high water of 1913? A. I don't remember.

Q. You don't remember that at all.

A. No, sir. [285]

Q. Do you remember it in 1903?

A. No; I do not.

Q. Then, what you mean to tell the jury is that so far as your observation goes, in your opinion 1918 was the highest water we have had?

A. Yes.

Testimony of Melvin B. Summers, for Defendants.

MELVIN B. SUMMERS, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Summers, will you state your name, please? A. Melvin B. Summers.

Q. Where do you live, Mr. Summers?

A. Juneau.

Q. How long have you lived here?

A. Little over six years.

Q. What business are you engaged in?

A. I'm in charge of the Weather Bureau in Alaska.

Q. Have you the records of rainfall in Juneau?

A. Yes. We have the daily records, beginning with 1912—I have forgotten the month—and we have tabulated records of monthly values prior to that.

Q. How long?

A. As far back as the records go.

Q. That's only monthly values? A. Yes.

Q. You have the dailies?

A. We have a few dailies, or rather intermittent records. The [286] continuous record dates from some time in 1912. I think it is July.

Q. You have a continuous daily record?

A. A continuous daily record.

(Testimony of Melvin B. Summers.)

Q. What do those few daily records that you have prior to that time consist of—periods of heavy rain, or what?

A. They give the daily precipitation.

Q. But you say they are not complete?

A. They are not complete for certain years. There are a few years that they are complete.

Q. Have you the record— Were you in Juneau on September 26, 1918? A. Yes, sir.

Q. Have you the record of the rain in Juneau on that day? A. Yes.

Q. For what period? What was it, Mr. Summers, for a twenty-four hour period?

A. The greatest amount in twenty-four consecutive hours was 5.54 inches, from 5:34 P. M. the 25th to 5:34 P. M. the 26th.

Q. What is the next highest twenty-four period that you have in your records prior to that time?

A. There is a record of four inches in September, 1902 and three and a half inches in October, 1913.

Q. That was the highest, was it? A. Yes.

Q. Mr. Summers, did Mr. Sharick keep some records prior to your records? A. Yes.

Q. And those were kept under the supervision of the Weather Bureau? [287]

A. In a measure, Mr. Faulkner. The Weather Bureau, however, hasn't made very much use of his precipitation records. It was rather fragmentary and it was evident from the record that he didn't measure his precipitation daily. The Bureau has made use of his monthly totals of precipitation,

(Testimony of Melvin B. Summers.)

but we haven't made much use of the daily amounts because it is evident he didn't measure daily.

Q. He was what you call a volunteer observer?

A. Yes; he was; but there was never any one here to improve his work, or give him any instruction.

Q. You had no official here prior to that time?

A. No; there was no one here prior to January 1, 1917, or September, 1916, when I came here.

Q. That was when you came here? A. Yes.

Q. Now, from 1912 to 1916, till you came here, who kept the records?

A. Kept on the Governor's lot—

Q. I mean—

A. (Continuing.) Apparently by officials of the Governor's office. C. R. Reid signed the report for July, 1912.

Q. Kept by the Governor's office? A. Yes.

Q. And before that time they were kept only by volunteer observers?

A. Yes; well, the Governor's office was a volunteer observer, so far as that is concerned. It had no official connection with the Bureau, except that the Bureau furnished the equipment; furnished thermometers, and so forth. [288]

Cross-examination.

(By Mr. COBB.)

Q. You wouldn't say that those records kept before your coming here were correct, would you?

(Testimony of Melvin B. Summers.)

A. I think they are, so far as those that were made at the Governor's office are concerned.

Q. You wouldn't undertake to say positively that they were correctly recorded, would you?

A. The Weather Bureau has so considered them and the Bureau has accepted them as *bona fide* records.

Q. I am not asking you what the Bureau has done. Do you know?

The COURT.—Wait a minute. Are you asking him for his personal opinion?

Mr. COBB.—No; I'm asking for his personal knowledge.

Q. Do you know whether they are correctly recorded or not?

A. I think they are just as correctly recorded as any co-operative observers that have been authorized to keep co-operative records, with the exception of those that have been proved otherwise, as in the case of Mr. Sharick's.

Q. Personally, do you know that Mr. Sharick's records were always correctly recorded?

A. I do not; I don't think they were.

Q. You don't know of your own knowledge whether the other observers correctly recorded theirs? A. I think that these were.

Q. I didn't ask you what you thought. I know we all think probably they were, but do you know that they were?

A. I can only give you my opinion.

Q. But I am asking you for your knowledge.

(Testimony of Melvin B. Summers.)

You don't know that they were correctly recorded, do you? [289]

A. The Weather Bureau has accepted them—

Q. (Interrupting.) I'm not asking you what the Weather Bureau did. My question is a very plain one. Do you know that they were correctly kept?

A. I wasn't here to see them.

Q. How is that?

A. I wasn't here to oversee the work.

Q. You don't know anything about it except that you found them here when you came up.

A. I don't know that Mr. Folta's record is accurately kept. I assume that it is.

Q. Now, Mr. Summers, one or two other questions only. Juneau is at the mouth of Gold Creek.

A. Yes.

Q. The records kept here would not indicate the rainfall up in the basin, would they, except inferentially?

A. Only in general terms; yes.

Q. How is that? A. Only in general terms.

Q. Now, since you have been here with the Weather Bureau and observing other records kept, you know as a matter of fact, do you not, that very frequently there is very much higher rainfall up at the head of Gold Creek basin than there is in Juneau? A. Yes, that is generally the case.

Q. Generally the case?

A. Generally the case.

Q. And it is that rainfall that produces the high water in the creek? [290] A. Yes.

(Testimony of J. C. McBride.)

Q. The rainfall in Juneau doesn't go into Gold Creek at all? A. No; no.

Testimony of J. C. McBride, for Defendants.

J. C. McBRIDE, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you please state your name.

A. J. C. McBride.

Q. Where do you live, Mr. McBride?

A. Juneau, Alaska.

Q. What office do you hold?

A. At present, I'm Collector of Customs.

Q. How long have you lived in Juneau?

A. Since 1894.

Q. 1894 or 1904?

Mr. COBB.—What year, Mr. McBride? I didn't catch it. A. I have been here 18 years.

Q. 1904, then. Mr. McBride were you here on September 26, 1918? A. Yes, sir.

Q. Where were you on that day?

A. Well, I was all over town that day. I was out on the flats, Casey-Shattuck flats; up on the hill here and over on this hill (pointing). I was helping at different places on account of the flood that day.

Q. Did you observe the flood conditions in Gold Creek? A. Yes.

(Testimony of J. C. McBride.)

Q. Were you out there that day? [291]

A. Yes.

Q. At Gold Creek. Now, did you observe the flood conditions on what they call Swede Hill, or Gastineau Heights? A. Yes.

Q. And did you observe any flood conditions or conditions caused by the rainfall, on what is known as Chicken Ridge, up on the hill back of the court-house? A. Yes.

Q. What occurred up on Chicken Ridge that day—any slide up there that you know of? I mean up on what is called Chicken Ridge.

A. Well, that's where Garfield lives?

Q. Yes.

A. Well, I noticed that his house, the back part of his foundation had partly washed away, so much so that they took out the furniture that was in it—

Mr. COBB.—Well, I object to what somebody told him.

The WITNESS.—What is that? I didn't say somebody told me.

Mr. COBB.—Didn't you say that somebody told you?

The WITNESS.—No; I was there.

Q. Now, what occurred on Gastineau Heights?

A. Three or four houses slid out there.

Q. What caused them to slide? A. Water.

Q. How long had those houses been there, do you know? Were they there when you came here?

(Testimony of J. C. McBride.)

A. They were all there except the Bathe Apartments. The others were there except—

Q. The others were there since you came?

A. Yes. [292] A. Yes.

Q. Did you observe any damage to the Gastineau Hotel? A. Yes.

Q. What was the nature of that?

A. Water running through the hotel and coming through the corridor.

Q. Had you been out to the Casey-Shattuck flats since the flood of 1918? A. Yes.

Q. And observed the damage done out there?

A. Yes.

Q. Have you ever been engaged in mining, Mr. McBride? A. I have; yes.

Q. Prior to the time that you were appointed Collector of Customs, what business were you in?

A. I was in the mercantile business.

Q. In Juneau? A. Yes.

Q. Had you observed periods of high water before in Gold Creek and vicinity? A. Yes.

Q. How did the high water of September 26, 1918, compare with anything else you had seen prior to that time?

A. Largest we have had since I have been here.

Q. How is that?

A. It was the largest fall that we have had since I have been here.

Q. You say the largest rain? A. Yes. [293]

Q. And the highest flood?

A. The highest flood.

(Testimony of J. C. McBride.)

Cross-examination.

(By Mr. COBB.)

Q. How many times have you seen high water up there, Mr. McBride?

A. Well, several times, Mr. Cobb.

Q. Well, about how many?

A. Oh, half a dozen times, probably.

Q. A half dozen times. You simply don't recall, in the eighteen years that you have been here, another period of water of high water as high as that? A. Not as high; no, sir.

Q. How is that? A. Not as high; no, sir.

Q. Did you see the creek during the period of high water during 1913?

A. I can't say that I did.

Q. In saying that it is the highest, then, you have no recollection of the 1913 flood?

A. Not in particular; no, sir. The only thing I'm using, probably as a basis for that is the bridge out at Gold Creek—

Q. (Interrupting.) How is that?

A. The bridge at Gold Creek never had gone out before to my knowledge.

Q. You don't know whether it was the high water, or the undermining of the abutments that carried it out?

A. This last time; the time that it went out?

Q. How is that?

A. The time that it went out? [294]

(Testimony of J. C. McBride.)

Q. Yes. A. I assume that it was high water.

Q. You just assume that? A. Yes.

Q. You don't mean to tell the jury that the water ever got as high as that bridge? A. Yes; it was—

Q. (Interrupting.) Did you see the bridge when it went out?

A. No; but I was there before it went out.

Q. You were there before it went out?

A. Yes.

Q. Was the water up to the bridge then?

A. Practically; that is, the stumps, timbers, and so on, coming down.

Q. I know what was coming down, but when you were out there, was the water as high as the bridge?

A. No, it wasn't; when I was out there, it was not.

Q. What hour was that?

A. Well, I was there along in the morning and along just after lunch.

Q. Just after lunch. Now, then, you have no recollection of the high water of 1913? A. No.

Q. Do you recall whether you were in town that day or not?

A. Well, I couldn't say that I was as a positive fact, on that particular day.

Q. You couldn't say. A. No.

Mr. COBB.—That's all. [295]

Testimony of H. I. Lucas, for Defendants.

H. I. LUCAS, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Lucas, will you state your name?

A. H. I. Lucas.

Q. Where do you live? A. In Juneau.

Q. How long have you lived in Juneau?

A. Over ten years.

Q. Are you a member of the Fire Department?

A. Yes, sir.

Q. Were you in Juneau on September 26, 1918?

A. Yes, sir.

Q. Were you out at Gold Creek in the Casey-Shattuck flats on that day? A. Yes, sir.

Q. When did you go there? A. About noon.

Q. How did you come to go out there? What caused you to go out there?

A. The alarm of fire.

Q. You went out there with the Fire Department?

A. I was instructed to go out there with the Fire Department.

Q. When you went out you say it was about noon? A. Yes.

Q. Where did you go when you first went out there?

(Testimony of H. I. Lucas.)

A. I went out past the Governor's house, down past the bridge, and over around to Mr. Casey's house on the other side of the creek. [296]

Q. That is across the Gold Creek bridge?

A. Yes.

Q. What did you observe when you crossed the bridge, with reference to waters in the creek? Were they high?

A. Yes, the water was very high at that time.

Q. How close to the bridge was it at that time?

A. Pretty close to the under-pinning of the bridge; in fact, the bridge was rather weak. I think I was probably the last man to cross it—one or two of us.

Q. Now, when you went across the bridge, what happened to the bridge after you went across?

A. Why, it gave way.

Q. Went out, did it? A. Yes.

Q. Where did you go when you went across the bridge?

A. I went down past the Northern Laundry to Casey, Junior's house, Wm. Casey, Junior.

Q. Now, I will ask you to point out to the jury—just take a look at that photograph, Defendant's Exhibit No. 1—and ask you if you can just look at it and identify the place where you were?

A. Yes.

Q. Will you show to the jury over here where that place was?

A. This (indicating) is the house right here. That is William Casey, junior's house (pointing).

(Testimony of H. I. Lucas.)

Q. Now, will you show the jury, from that photograph, tell the jury what was the condition of the waters of the creek at that time?

A. Well, the waters of the creek at that time were away up around in here (indicating); right around this house and [297] running over there.

Q. Were you over in this area (indicating)?

A. Yes; over here by the laundry.

Q. Was the water flowing down there?

A. Down here?

Q. Yes. A. Oh, yes.

Q. Where did it go with reference to Billy Casey's house? A. All around that.

Q. Was it deep water there or shallow?

A. Well, I imagine around that house it was probably a foot deep, when we were packing out the furniture, and so forth, out of the house.

Q. What did you do while you were there?

A. We took the furniture out of the house, windows, sills, stove and everything that could be taken out. It was taken out of there and taken to his father's house.

Q. What was the condition around his father's house?

A. Water was going on through here and filled the basement of that house there. There was at least between two and three feet of water in the basement of Casey, senior's house that—well, I wouldn't say at that time, but an hour or two later.

Q. And the water was flowing over both banks, bulkheads. You remember where the bulkheads

(Testimony of H. I. Lucas.)

were—the bulkhead on the banks of the stream?

A. No, I don't remember where the bulkhead was.

Q. Well, do you remember the condition of the water? Was there water on both sides of the bulkhead? Could you see the bulkhead at that time? [298] A. No.

Q. Was the water in through here, where I am pointing, level? A. Yes.

Q. As high on one side as the other?

A. Yes; running through here.

Q. How long did you stay here?

A. I was there between four and five o'clock in the afternoon, I should judge.

Q. Where did you go from there?

A. Well, that was between William Casey, junior's house and William Casey, senior's house. From there I went back to the other side of the creek.

Q. Did you go down towards the bay?

A. I had to go around by Willoughby Avenue?

Q. The bridge was gone at that time?

A. Yes; the bridge was gone.

Q. Did you observe any water down there?

A. Oh, yes; everything was covered with water down there.

Q. Everything was covered? A. Yes, sure.

Q. Ever been called out there before with the Fire Department to assist in a flood?

A. Not in any flood; no.

Q. Did you ever see as great a flood?

Mr. COBB.—We object to that. The period for

(Testimony of H. I. Lucas.)

the purpose of comparison, is too short to be of any value.

Mr. FAULKNER.—It's of value for the period it covers.

The COURT.—Yes. Objection overruled.

Q. Within your residence in Juneau, have you ever seen as high a period of water? [299]

A. No; I don't believe I ever have.

Q. Did you observe any other damage that was done in any other part of town that day?

A. Yes; there was damage done back of the Gastineau Hotel.

Q. What happened up there?

A. Water came down the hill there and carried the Bathe Apartment up against the rear of the Gastineau Hotel, and took Billy Williamson's house out—

Q. Did what?

A. Bill Williamson's house, I say, had washed down hill into the Bathe Apartments.

Q. Do you know how long those houses had been there—any of them?

A. Well, the Bathe Apartments had been there, let's see—been there for four years, I should think.

Q. Now, the other houses, do you know anything about those?

A. They were there when I came to town.

Q. Did you observe any damage that day, or after the flood, up at Mr. Garfield's house?

A. Yes.

Q. What happened there?

(Testimony of H. I. Lucas.)

A. Why, the bank was washed away back of Garfield's house, down into the basin there.

Q. Where is Garfield's house?

A. Up at the head of Main.

Q. Is it near where you live?

A. Yes; right close to it.

Q. About how far from your house?

A. I should judge about two hundred, three hundred feet. [300]

Q. And did you see that bank that was washed away there? Did you see it after it was washed away? A. After it was washed away; yes.

Q. What was the condition of that house after the bank was washed away?

A. Well, the corner of it, I should say, the northwesterly corner, probably, was kind of hanging out there over the bank.

Q. That is, the dirt under that corner of the house had—

A. (Interposing.) Yes; the dirt had slid down.

Q. And into the creek? A. The creek or pond.

Q. Do you know whether that was a permanent bank or a filled-in bank? Could you tell from the appearance of it?

A. Why, I'm not exactly sure of that, myself. I wouldn't want to say just exactly whether it was or not.

Q. But you do say that the washed out area extended under the house? A. Yes.

Q. And you say that the house was hanging over?

(Testimony of H. I. Lucas.)

A. Yes; we took all the furniture out of the house for fear the house would go over the bank.

Cross-examination.

(By Mr. COBB.)

Q. How long have you been in Juneau, did you say? A. Little over ten years.

Q. You came here about 1912? A. 1912; yes.

Q. 1912. Where were you in 1913?

A. I was here. [301]

Q. Did you observe the high water that year?

A. No.

Q. Didn't go out to Gold Creek during the period of high water? A. Not in 1913; no.

Q. There were no houses on the flat, then, to be damaged by high water in the creek?

A. Not to my knowledge.

Q. It was all settled there since.

A. There was a slaughter-house down there on Gold Creek. That is the only one I can remember.

Q. Now, you stated a moment ago, in your direct examination, that when you went over the bridge, when you first went out there, it was getting weak. What do you mean by "getting weak"?

A. Well, the timbers were weakening. You can tell; when you go across a bridge, ordinarily it feels solid.

Q. Yes.

A. And this bridge kind of teetered, as you might call it, like weak ice.

(Testimony of H. I. Lucas.)

Q. As though the piers on either side were being undermined? A. Yes.

Q. That is what the trouble was. The water wasn't as high as the bridge

A. No, but it was up pretty close to the underpinning of the bridge.

The COURT.—You mean the timbers under the bridge planking?

The WITNESS.—No; the under-capping of the piles.

The COURT.—Oh, the beams?

The WITNESS.—Yes, the beams. [302]

Q. Mr. Lucas, this damage that you are talking about being done down at the Gastineau, the Gastineau Hotel is built right up against the mountain and the dirt at the back of it, the surface of the ground up at the back of it, comes up to about the second-story window, doesn't it? A. Yes.

Q. What caused the damage there was these houses sliding down, catching and making a dam and carrying the surface water into it?

A. I should judge that the water brought down off from the hill, back up against the hotel, broke in through the windows and came in through the corridors and out the front.

Q. The water wasn't as high as the second-story window? A. No, no, the ground.

Q. In other words, they had excavated back into the hill so that the back of the lot that they had built on, was as high as the second-story window?

A. Well, yes.

(Testimony of H. I. Lucas.)

Q. That was the situation?

A. I should judge so. I have never been back of the Gastineau until after the flood. I know it was dug out.

Q. Now, then, up there on Chicken Ridge, this house of Mr. Garfield's is right square on top of the hill? A. On top of the hill?

Q. Yes? A. Yes.

Q. Don't you know that— You remember when Mr. Wetterick built the house next to it?

A. Yes.

Q. Don't you know that he excavated there for a foundation and basement? [303] A. Yes.

Q. What did he do with the earth?

A. I don't know; put it on the bank, I suppose.

Q. Threw it down, clear off?

A. Threw it down the bank of his lot, I guess.

Q. Was that the dirt pile that went out?

A. I'm sure I don't know.

Q. What is that? A. I'm sure I don't know.

Q. You don't know? A. No.

Q. Well, when you got up there, you saw that it was mighty loose looking stuff that went down, wasn't it?

A. Well, the dirt in the back of the Gastineau was pretty loose, too; pretty well washed with water.

Q. This occurred back of it, and the bank where it slid off was an extremely steep bank that ran down into the pond? A. Yes.

(Testimony of H. I. Lucas.)

Q. At an angle of more than, at least forty-five degrees? A. Yes; all of that.

Q. So much so that it is likely that some of it would slide off most any time you walked over it?

A. Well—

Q. How is that?

A. If it was loose, I imagine it would; yes.

Testimony of L. V. Winter, for Defendants.

L. V. WINTER, called as a witness for the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [304]

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Winter, will you state your name?

A. Lloyd V. Winter.

Q. Where do you live, Mr. Winter?

A. Front Street; lower Front.

Q. In Juneau? A. Yes.

Q. How long have you lived in Juneau?

A. Twenty-two and a half years.

Q. Before you lived on Lower Front Street, where did you live? A. Up on Swede Hill.

Q. Were you in Juneau on September 26, 1918?

A. No.

Q. Where were you—do you know?

A. In Seattle.

Q. Now, prior to that time, before you went to

(Testimony of L. V. Winter.)

Seattle, were you living on what is known as Swede Hill? A. Yes.

Q. In what house there?

A. In the Caro house.

Q. Do you know any other house that was up there?

A. Yes; the Burford house was about thirty-five feet to the north of it, on the same level.

Q. Any other houses?

A. To the south was an apartment house.

Q. Any other house up there? A. No.

Q. Do you know where Mr. Passells lived?

A. They lived in the Burford house, thirty-five feet to the north. [305]

Q. Do you know where Mr. Williamson lived up there?

A. I believe they lived in the house that was occupied by the Passells.

Q. Do you know Mr. Gillen's house?

A. Well, that's to the south.

Q. Now, do you know where the G—— houses were up on that hill?

A. They were, I guess, seventy-five yards down toward Front Street.

Q. Now, when you returned from Seattle to your house, in what condition did you find it?

A. The lower floors of the house, about four or five rooms, had been flooded by silt and covered with mud, two or three inches of mud all over the carpets, and so forth.

Q. What did you observe with reference to the

(Testimony of L. V. Winter.)

other houses that had been up there before you went away?

A. The Burford house had been wiped off the hillside and down toward the Spickett residence, and then into the Bathe Apartment.

Q. Any other houses there washed down?

A. No; not at that time.

Q. How is that? A. No; not at that time.

Q. Did you observe any others? A. No.

Q. Now, Mr. Winter, how long had that house been there that washed down?

A. The Burford house?

Q. Yes. A. About twenty years.

Q. About twenty years. Now, I'll hand you a photograph and [306] ask you if you recognize that? A. Yes, sir.

Q. Did you take that photograph? A. I did.

Q. When?

A. November fifth, or ninth day. I don't see that date on there. Ninth day of November.

Q. What does that represent? Where was it taken from?

A. It was taken from the bridge that crosses an outlet of Gold Creek, looking north from the bridge on Willoughby Avenue.

Q. On Willoughby Avenue. Is that where the creek formerly came down—where the bulkheads were? A. It is.

Q. Is that looking up the creek?

A. That's looking up the creek.

Q. What did you find in that place where this

(Testimony of L. V. Winter.)

photograph was taken? What was in what was formerly the old bed of the creek there?

A. A lot of old stumps.

Q. Now, what character of stumps were they? What was their size?

A. Well, up to twenty-four to thirty inches.

Q. Did you see anything else in there of any consequence at that time besides stumps?

A. Oh, a lot of debris mixed up with it.

Q. This was taken just a few days ago?

A. Yes.

Mr. FAULKNER.—We offer that in evidence.

Mr. COBB.—What is the purpose of it? [307]

Mr. FAULKNER.—Well, to show the stumps that came down the creek.

Mr. COBB.—Well, if that's the purpose of it, I object to it, because we have proved and they have proved and every one of the witnesses has been asked about it—that the whole flume is filled up with debris—stumps came down there and filled the flume up on the morning of September 26, 1918. I don't know what they're going into it any further for.

Mr. FAULKNER.—Well, we want to show the condition. There are two pictures I want to introduce, showing the character of the stumps. I think the other picture shows stumps mixed up with timbers and logs. At the present time, this shows practically nothing but timber—doesn't show the character of the stumps that came down.

Mr. COBB.—It's too long after. It's five years

(Testimony of L. V. Winter.)

since and there is a picture already in evidence showing the conditions immediately afterward.

The COURT.—Objection overruled.

Mr. FAULKNER.—We'll ask that it be marked Defendant's Exhibit No. 7.

(Whereupon photograph mentioned was received in evidence and marked Defendant's Exhibit No. 7.)

Q. I will ask you if you took another photograph at that time? A. I did.

Q. Where was that taken? When?

A. The same day and date, within the same hour.

Q. What does that show?

A. Well, this photograph is looking south, to the direction of taking the other photograph.

Q. Looking on Willoughby?

A. The bridge. [308]

Mr. FAULKNER.—We'll offer that in evidence. We have no other photograph showing that exact spot.

Mr. COBB.—Well, I object to that as irrelevant and immaterial for any purpose.

Mr. FAULKNER.—Shows the condition under—

Mr. COBB.—Shows the conditions out there now. It's been testified by one witness, I have forgotten which, that the whole situation has been changed, and the bridge rebuilt since then.

Mr. FAULKNER.—Well, I didn't hear that.

Mr. COBB.—Well, it's a fact, anyway.

The COURT.—I fail to remember any such testimony.

(Testimony of L. V. Winter.)

Mr. COBB.—I think one of the witnesses testified to that effect.

The COURT.—It can be received and you can examine him on it as to whether it is in the same condition that it was then.

Mr. COBB.—It was only taken a few days ago.

The COURT.—I know.

Q. You took this picture on the same day?

A. Yes.

Q. This is the same place, only looking in the other direction?

A. Looking in the direction of the position of the camera.

Q. Looking toward the sea?

A. One looking north and the other looking south.

Mr. COBB.—Well, I can examine him on it and then you can offer it. I don't think it is material.

The COURT.—Well, the Court does. You can examine him as to whether they are in the same condition; whether the configuration is the same as it was immediately afterward. [309]

Cross-examination.

(By Mr. COBB.)

Q. Mr. Winter, do you know of any other houses up there on the hillside now that have been there twenty years? A. I presume there are some.

Q. How is that?

A. I presume there is, but I couldn't testify as to how many or which particular ones.

Q. I say, there are houses up there now that have been up there for twenty years? A. I believe so.

(Testimony of L. V. Winter.)

Q. Now, prior to 1918, had there been anything done up on the mountainside there that would most likely cause mud and rain slides at the time you first moved there?

A. That would cause mud and rain slides?

Q. Yes; in rainy weather.

A. I don't know about that.

Q. There had been a tramway built around there and the excavation material thrown down the hill?

A. I understand they had put up some electrical towers.

Q. Prior to 1918, hadn't the Alaska-Juneau Gold Mining Company built a flume and a track above where you are speaking about?

A. No; that does not extend anywhere near there.

Q. How is that?

A. That doesn't extend anywhere near there.

Q. Doesn't extend that far?

A. The house occupied by myself; no.

Q. I didn't recall just where your house was.

A. My residence is at the upper end of Rawn Way and Gastineau Avenue. [310]

Q. Your residence, that you speak of, is this side of the mouth of the tunnel that goes through the mountain there, about six or eight hundred feet?

A. Oh, a quarter of a mile.

Q. These pictures that you took the other day, do they show the conditions as they existed after the flood of 1918? A. I presume so.

Q. Do you know whether they do?

(Testimony of L. V. Winter.)

A. I believe they do.

Q. Do you know it? A. Yes, sir.

Q. Were you down there just afterwards?

A. Beg pardon?

Q. Were you down there just after the flood?

A. About three or four months later.

Q. How is that?

A. About three or four months later. I don't recall the date of the slide. If I knew that, I could tell you how soon after.

Q. Well, it was September 26, 1918.

A. November 26th?

Q. September?

A. September. I was there six weeks later.

Q. Six weeks later? A. Yes, sir.

Q. That would be somewhere around the middle of November? A. Yes, sir.

Q. There had been heavy rains in October, hadn't there? A. Yes.

Q. You know whether the condition was the same when you saw it in November? [311]

A. Yes, sir; very similar to that.

Q. Well, I say, do you know whether they are just the same as those after the flood of September 26?

A. You're speaking of this condition in the photograph?

Q. Yes. A. Yes, sir.

Q. No, that isn't the question. Do you know if, when you first saw this ground that you photographed here about the middle of November, 1918,

(Testimony of L. V. Winter.)

the conditions were the same there as the preceding September? A. Oh, I don't know about that.

Q. You don't know as to that?

A. The question is not altogether clear.

Q. Do you remember the rebuilding of the bridge across Gold Creek there at Willoughby?

A. I remember there being some repairs done there; yes.

Q. Had it practically rebuilt? A. Yes.

Q. Did that immediately after the flood?

A. I think some time after; yes.

Mr. COBB.—Now, I'll ask—I don't think it of much importance one way or the other—I ask to have these photographs excluded. They are not competent evidence that I can see for any purpose.

Mr. FAULKNER.—That is not all the testimony regarding the photographs. I just want to show that Mr. Winter took them and the position from which he took them. I have other testimony on these same photographs.

Mr. COBB.—I reserve my motion then. [312]

Testimony of I. J. Sharick, for Defendants.

I. J. SHARICK, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Sharick, please state your name, will you?

A. Yes.

(Testimony of I. J. Sharick.)

Q. Your name? A. I. J. Sharick.

Q. Mr. Sharick, where do you live?

A. Juneau.

Q. How long have you lived in Juneau?

A. Since 1898.

Q. 1898? A. Yes.

Q. Have you kept any weather records?

A. I have.

Q. In that period? A. Yes.

Q. What period?

A. I commenced about 1894.

Q. 1894? A. Yes.

Q. Now, how far did those records go?

A. About 1912.

Q. To about 1912? A. Yes.

Q. Have you the periods of the highest, the highest periods of rainfall with twenty-four hour periods during that time? [313]

A. Yes, I have a copy of the record.

Q. Will you refer to your copy? A. Yes.

Q. What was the highest rainfall in twenty-four hours, within those records?

A. The highest was 4.01 inches.

Q. When was that?

A. That was in September, September 7, 1902.

Q. When was the next highest?

A. The next highest was in October, the 17th, 1905.

Q. What was that? A. That was 3.50.

Q. What was the next?

(Testimony of I. J. Sharick.)

A. The next was in August, the 26th, 1905; that was 2.17.

Q. Those are 24-hour periods?

A. Yes; those are the highest during the month.

Q. Were you a volunteer weather observer?

A. Yes; I was an observer for the Government; yes.

Q. Did you keep that on the Government records?

A. Yes; I have the records; I have them here.

Q. Did the Government supply you with those records? A. Yes.

Q. I mean, they supplied you with the blanks?

A. They supplied me with the blanks.

Q. And you kept accurate records during those periods?

A. I kept the records during that time.

Cross-examination.

(By Mr. COBB.)

Q. Did you keep any records up in the basin?
[314]

(No response.)

Q. I say, you didn't keep any records up in the basin?

The COURT.—You'll have to come up closer.

A. I didn't hear you?

Q. I say, you didn't have any records kept of the rainfall up in the basin of Gold Creek?

A. No; it was right in Juneau.

Q. Right in Juneau. A. Yes.

(Testimony of I. J. Sharick.)

Q. And you haven't any records for 1913? Do your records show 1913?

A. I got it on my books there. I haven't got a copy of it.

Q. 1913? A. No; not 1913.

Q. You haven't any records for that year?

A. That's after—

Q. (Interrupting.) Yes.

A. 1912, when I quit keeping the record.

**Testimony of W. W. Casey, for Defendants
(Recalled).**

W. W. CASEY, recalled, one of the defendants herein, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Casey, I'll hand you a photograph marked Defendant's Exhibit No. 7 and ask you if you recognize that? A. Yes, sir.

Q. What does it represent?

A. A portion of the old cribbed channel above the bridge.

Q. The bridge?

A. The bridge just north of there. [315]

Q. Is that represented at the present time?

A. At the present time?

Q. What is in there at the present time?

A. Stumps and old logs.

Q. Now, are the stumps that are shown in that

(Testimony of W. W. Casey.)

photograph, the same stumps that came down the flood of 1918? A. Yes, sir.

Q. Has that section been changed any since the flood? Has anything been taken away from there?

A. Yes; the Indians have gone in there and cut wood and taken away all that they wanted.

Q. So that this portion that remains was there at the time of the flood? A. Yes.

Q. Have any of those stumps been put in there since the flood? A. I don't think so.

Q. Now, I will hand you defendant's exhibit No. 8 and ask you if that represents the same section?

A. The same section, south of the one shown there.

Q. And the stumps shown in that picture—

A. (Interposing.) Are the same.

Q. Were brought in there by the flood?

A. Yes, sir.

Q. Have any of them been put in there since?

A. No, sir.

Q. Now, Mr. Casey, there is a bridge shown here, crossing—what they call the Willoughby Avenue bridge. Has that bridge been built since the flood? A. No, sir.

Q. Is that the same bridge that has been there since the flood? [316] A. Yes, sir.

The COURT.—Is in the same condition it was at the time of the flood?

The WITNESS.—That's the stump that hit the bridge (indicating).

(Testimony of W. W. Casey.)

The COURT.—All right.

Q. You can identify that stump, can you?

A. Yes, sir.

Cross-examination.

(By Mr. COBB.)

Q. Were all the buildings shown in that picture there in 1918? A. I didn't hear you.

Q. How is that?

A. I didn't understand you.

Q. I say were those buildings there in 1918?

A. Yes, sir.

Q. Any building there in 1918 that is not there now?

A. Well, they have torn down Jimmy McKenna's barn that was there that year.

Q. Doesn't show, then, the same condition.

A. The foundation of the barn is still there.

Q. I say this picture doesn't show exactly the condition that was there in 1918?

A. Aside from that.

Q. Did you say the Indians had taken some stuff out of there? A. Yes, some logs.

Q. That is not shown in this picture?

A. No; they have cut some wood and carried it away.

Q. There is some difference, then, besides the foundation of the house that was moved. [317]

A. Yes.

Q. There is quite a difference between the conditions shown in this picture and the conditions in 1918, isn't there, Mr. Casey?

(Testimony of W. W. Casey.)

A. There is a lot of wood gone.

Q. Hasn't that bridge been repaired? Wasn't it repaired after the flood of 1918?

A. I don't know. They may have repaired the street there.

Q. Don't you know they did that—that it was necessary to do it? You were living out that way.

A. We used it the day of the flood.

Q. I am not asking you, now, whether you used it the day of the flood, but wasn't it repaired by the city?

A. Not to my knowledge. It may have been.

Q. You mean by that that you weren't there when it was repaired, but you know it was repaired? A. No, sir.

Q. You don't? A. No.

Mr. COBB.—Now, I'll renew my motion.

The COURT.—He points out a certain stump that he says struck the bridge on the 26th of September, 1918; and another reason is that the picture shows the general character of the stumps and the difference between what it is like now and the time the first picture was taken.

Mr. FAULKNER.—The other picture shows the top of the pile and this one shows the bottom.

The COURT.—Motion denied.

Mr. WICKERSHAM.—Exception.

Mr. COBB.—We'll take an exception. [318]

Testimony of John C. Hayes, for Defendants.

JOHN C. HAYES, called as a witness on behalf of the defendants, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name?

A. John C. Hayes.

Q. What is your occupation?

A. Superintendent of the Alaska Road Commission.

Q. Where do you live? A. Juneau.

Q. How long have you lived in Juneau and vicinity, Mr. Hayes?

A. Well, I have been here off and on for about 10 years.

Q. Were you here September 26, 1918? (162—149) A. Yes, sir.

Q. Did you observe the rainfall and the high water and the flood on that day?

A. Yes, sir.

Q. Had you ever in your experience, Mr. Hayes, seen as great a rainfall or as high water in Gold Creek and vicinity as there was on that day?

A. Not to my observation, no, sir.

Mr. FAULKNER.—That is all.

Mr. COBB.—No cross-examination.

(Witness excused.) [319]

Testimony of Geo. H. Canfield, for Defendants.

The testimony of GEO. H. CANFIELD, also taken on former trial, as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name.

A. George H. Canfield.

Q. What office do you hold—what position do you occupy?

A. Engineer, United States Geological Survey.

Q. What are your duties, Mr. Canfield?

A. My duties are gathering daily stream fall records in several stream in which we have installed gaging stations in Southeastern Alaska.

Q. How long have you been engaged in that work, Mr. Canfield? A. Since 1910.

Q. And have you a gaging station in Gold Creek, near Juneau? A. Yes, sir.

Q. Have you the measurements of the volume of water in that stream?

A. Yes, sir, since July 20th, when the gage was installed, to date—July 20th, 1916.

Q. Have you a record showing the volume of water in Gold Creek on September 26, 1918?

A. Yes, sir, a record which we computed from the chart recorded in the gage set in Gold Creek, which kept a record of that up until about one o'clock, when it was disarranged by the flood; but we took the peak in the creek and estimated from

(Testimony of Geo. H. Canfield.)

that from two o'clock and the remainder of the day.

Q. What was the highest point it reached?

A. The highest point was the stage indicated by the record of 6.81 feet, which corresponds to a flow of 2,600 cubic feet per second, which I have computed from the available data which I have.

Q. 2,600 cubic feet per second? (182—169)
[320] A. Yes.

Q. At what point was that, Mr. Canfield?

A. I have estimated that about 2 o'clock.

Q. At what point in the creek?

A. That is at the Gold Creek bridge, on the way to Perseverance.

Q. The first bridge?

A. Yes, the first bridge.

Q. What is the highest number of cubic feet per second for any period before that, in your records?

A. The highest period before that—between July 20, 1916, and that date was 1,000 cubic feet per second, on August 19, 1917.

Q. So that the volume on September 26, 1918, was a little over $2\frac{1}{2}$ times as great as the highest period before that within your operations?

A. Yes, sir.

Mr. FAULKNER.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. You have no records going back of that at all, Mr. Canfield?

(Testimony of Geo. H. Canfield.)

A. No, we have no records at all previous to that date.

Q. This instrument does it record the actual number of cubic feet passing down the stream—how do you arrive at that?

A. The instrument records the elevation of the water—the surface, at any time. The instrument is operated by a float that rests in the well, and as the water rises in the well it is recorded on a paper which runs over a drum, which moves by clock-works, so at any time you can take from this chart the corresponding height of the water.

Q. Now, the volume of water that passes any given point in a flowing stream, what does that depend upon—what elements?

A. The volume depends upon the area of the cross-section and the velocity, or feet per second; multiplying these together gives the product we call cubic feet per second. [321]

Q. Now, if your cross-section of the channel shows 150 feet, how rapidly would the water have to be moved to take care of 2,600 cubic feet per second?

A. It would be 2,600 divided by 150—approximately 15.

Q. It would be 17 and a fraction, wouldn't it?

A. It would be 150 into 2,600.

Q. And suppose your cross-section had 230 square feet, it would not have to move so fast?

A. No, it would not.

(Testimony of Geo. H. Canfield.)

Q. Can you tell the jury about how fast a stream would run on a two per cent grade?

A. That would involve formulas and computations, and I couldn't say offhand.

Q. If your channel, however, had a cross-sectional area of 230 square feet or more, on the same grade, it would take care of a great deal more water than your 150 feet cross-section would it not?

A. Yes, sir.

Q. And isn't it also a fact that the cross-sectional area of the channel, other things being equal—that is, the grade being the same, the flow would be more rapid in the middle?

A. Yes, the velocity is more rapid towards the middle, unless there are some disturbances.

Q. So that the cross-sectional area of a channel 230 feet would take care of considerably more water than the same ratio as to 150, isn't that a fact?

A. I would have to figure that out from the formulas.

Q. Isn't the principle applicable to that, that there would be a more rapid flow in the center—less friction?

A. Yes; if the area was doubled the flow would be more than doubled.

Q. That is, the capacity of the channel on the same grade increases in a greater ratio than its cross-sectional area?

A. I am not prepared to state definitely on that.

(Testimony of Geo. H. Canfield.)

Q. That is, you are not prepared to say how much greater it [322] would be?

A. No. (184—171)

Q. But it is greater—the ratio is greater?

A. I am not prepared to state that, either.

Q. Can you prepare yourself to answer that question?

A. I do not think that involves my official duties—I am just giving the flow of the creek at that time.

Mr. COBB.—Very well. That is all.

(Witness excused.)

Testimony of Geo. T. Jackson, for Defendants.

The testimony of Geo. T. JACKSON, also taken on the former trial as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you please state your name.

A. George T. Jackson.

Q. What is your profession?

A. Mining Engineer.

Q. How long have you been engaged in that work, Mr. Jackson? A. About 20 years.

Q. Where do you live? A. Juneau.

Q. How long have you lived here, Mr. Jackson?

A. Eleven years.

Q. Are you familiar with the weather conditions in and around Juneau? A. Yes.

Q. Now, Mr. Jackson, in that 11 years what has been your work—where have you been engaged?

(Testimony of Geo. T. Jackson.)

A. Well, I was engaged at the Perseverance, the old Perseverance mine, as assistant superintendent for four or five years; mine superintendent at the Perseverance for about three or four years; assistant manager and manager of the Alaska Gastineau Mining Company.

Q. All of the eleven years your work has been around the Perseverance mine? A. It has.

Q. And where is the Perseverance mine situated in reference to Juneau and Gold Creek? [323]

A. Almost at the head of Gold Creek.

Q. Back in the canyon?

A. Back in the canyon; yes, sir. (159—146)

Q. North of Juneau. Are you acquainted, Mr. Jackson, with the periods of high water in Gold Creek, during that period of eleven years?

A. Yes, I have had a good deal of trouble from floods during that time.

Q. Were you in Juneau and vicinity of September 26, 1918? A. I was.

Q. Did you observe the flood and the conditions that existed at that time? A. Yes.

Q. I will ask you whether at any time within your knowledge there had been a period of such high water as there was that day—had you ever seen the water as high as it was that day?

A. No, I never had.

Q. Had you ever seen the rainfall as great as it was on that day and during the 24 hours previous?

A. No; our records show that was the highest ever since we kept them—six or seven years any-

(Testimony of Geo. T. Jackson.)

way, and I noticed the creek before that for three or four years.

Mr. COBB.—I object to his testifying about his records, and ask that the answer be stricken.

The COURT.—Just answer the question.

Q. Within your recollection then, that was the highest point? A. Yes.

Mr. FAULKNER.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. Whereabouts did you measure it from Mr. Jackson? A. From these records.

Q. You said it was the highest point—have you any particular [324] point?

A. I am gauging by the damage the waters did—the places it damaged that it never did before.

Q. What point do you refer to? (160—147)

A. I am referring to a point near the red mill—the bridge that has been in there—I believe built by the Alaska Juneau, and that bridge has stood for many years—probably fifteen—and this flood took out the approach to that bridge for nearly 150 feet or more—washed it clear away and left the bridge high and dry.

Q. Hasn't that happened before? A. No.

Q. You are positive of that, Mr. Jackson?

A. I am positive of that.

Q. How long back are you testifying to that it hasn't happened?

A. Since I have been in the country—eleven years.

(Testimony of Geo. T. Jackson.)

Q. Eleven years—it hasn't happened as far back as you can go? A. Yes.

Q. As a matter of fact, Mr. Jackson, every few years we have high floods in Gold Creek, don't we?

A. Yes, we do.

Q. Periods of high water? A. Yes.

Q. The head of the creek is approximately how high above the level of Gastineau Channel?

A. At Perseverance about 1100 feet,—1100 feet at the foot of the Perseverance.

Q. How many miles upstream is that?

A. Four and one-half miles.

Q. A drop of 1100 feet in $4\frac{1}{2}$ miles?

A. Yes, sir.

Q. And precipitous mountains on either side?

A. Yes.

Q. So that the conditions are ideal for quick and heavy floods in the stream? A. Yes.

Q. You wouldn't undertake to say positively that this is the highest flood that has ever been in Gold Creek there? (161—148) [325]

A. Since I have been here—to my knowledge, yes.

Q. From your knowledge or your opinion?

A. My opinion based upon my observation.

Q. But beyond that you would not say?

A. Of course, you say I cannot use the records,—according to the records we have kept it is the highest.

Q. Who kept those records?

A. They were kept at Perseverance.

(Testimony of Geo. T. Jackson.)

Q. Have you got them?

A. We have got them, yes.

Q. Didn't counsel ask you to bring them with you? A. I will bring them up.

Mr. FAULKNER.—I will put them in later.

A. They are turned into the regular Bureau—we kept them for the Government—they are officially kept.

Mr. COBB.—I didn't know they were here. I inquired of the Government man here and he didn't have them. That is all.

(Witness excused.) [326]

Testimony of Henry States, for Defendants.

The testimony of HENRY STATES, also taken on the former trial, as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Judge, how long have you lived in Alaska?

A. Oh, thirty-seven years.

Q. Thirty-seven? A. Thirty-seven.

Q. When was Juneau first settled by white men?

A. 1881?

Q. In 1881? A. Yes.

Mr. FAULKNER.—I think that's all.

Defendants next read in evidence the deposition of HENRY SHATTUCK, as follows:

Deposition of Henry Shattuck, for Defendants.

Interrogatory No. 1. Are you one of the defendants in the above-entitled cause? A. Yes.

No. 2. Did you, in the fall of 1914, or at any other time, have a conversation with A. Eikland, the plaintiff in this case, regarding the building of the bulkheads on the banks of Gold Creek mentioned in the complaint of this case?

A. I may have, and probably did, discuss matters with him in a neighborly way regarding the bulkhead construction referred to, as he lived near by and we were on friendly terms.

No. 3. Did A. Eikland, one of the plaintiffs in this case, in the fall of 1914, or at any other time, protest about the building of the flume or bulkheads on Gold Creek mentioned in the complaint?

A. He did not object to the construction of the bulkhead in 1914, or at any other time, but, on the contrary, was well disposed towards the construction mentioned on account of the protection it would afford his property. One of the weak spots in the bank of Gold Creek, prior to the building of the flume and bulkhead in 1914, was immediately in the rear of his lot, and the bulkhead kept the stream from cutting any [327] further into the bank towards his property.

No. 4. Did A. Eikland, one of the plaintiffs in this case, tell you in the fall of 1914, or at any other time, that the building of the bulkheads and flume

(Deposition of Henry Shattuck.)
on Gold Creek mentioned in the complaint herein would endanger his property, or that he was opposed to the building of the same?

A. He did not in 1914, or at any other time.

Cross-interrogatory No. 1. In what business were you engaged in the fall of 1914?

A. I was engaged in the hardware business at Juneau, Alaska.

No. 2. Did you personally take any part in the building of the bulkheads referred to in the direct interrogatories? A. Yes.

No. 3. Did you testify in that case on a former trial? A. No.

No. 4. Is it not a fact that W. W. Casey had entire charge of the building of the bulkheads referred to in the direct interrogatories and was looking after the property, and that you were devoting practically all your time to your other business in the year 1914.

A. Mr. Casey had active charge of the construction, but I went frequently to see the work and often discussed it with both Mr. Casey and Allen Shattuck. [328]

Testimony of Gustave Anderson, for Defendants.

GUSTAVE ANDERSON, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name.

(Testimony of Gustave Anderson.)

A. Gustave Anderson.

Q. Where do you live, Mr. Anderson.

A. I live on Sixth and Kennedy.

Q. In Juneau? A. Yes.

Q. How long have you lived here?

A. I lived in Juneau for twenty-three years?

Q. For twenty-three years? A. Yes.

Q. Are you familiar with Gold Creek where it comes out over the Casey-Shattuck property?

A. Yes.

Q. How long have you been familiar with that creek, Mr. Anderson?

A. Well, I can say for about eighteen years.

Q. Eighteen years. A. Yes.

Q. Did you ever do any work down there?

A. Yes.

Q. Whereabouts was that?

A. Well, I helped to do some work down there in many places on that creek. I worked high up in the basin and way down on the beach—different places along the creek.

Q. I mean down in the vicinity of the electric light plant. A. Well, I done work there; yes.
[329]

Q. When was that?

A. In 1908 I worked for the electric light company.

Q. In 1908? A. Yes.

Q. Now, where was the creek-bed then?

A. Well, the creek-bed—I can't say just exactly

(Testimony of Gustave Anderson.)

where it was. That has been shifting time and time again.

Q. Shifting some?

A. Yes; from year to year; and I can't say exactly where the creek-bed was.

Q. Was there a creek-bed close to the electric light plant?

A. Some times there was, and sometimes there wasn't. Some years there was close to the plant and even went under the coal-bunker.

Q. Went under the coal-bunker of the electric light company?

A. What coal-bunker it was, I don't know. I don't know whether it is there now or not, but it's been there since 1909, I think.

Q. What kind of work did you do there?

A. In 1908, we dammed up the creek because it was going into the electric light plant. I think Mr. Pullen was in charge at that time.

Q. To keep it from going into the electric light plant?

A. Yes; the creek was going into the light plant, and when we dammed up the creek, it was low. Of course, you couldn't dam it up when the creek was high, but we dammed it up when the creek was low.

Q. You did that to keep the water from going into the electric light plant? A. Yes. [330]

Q. And did you do any more work out there afterward?

(Testimony of Gustave Anderson.)

A. In the year afterward, Henry Shattuck had me there to work for him.

Q. Where was that?

A. That was opposite that coal-bunker, too—just the same channel where I was working before.

Q. The same channel.

A. Yes. And I cut brush and put it in there, and the intention was to get the gravel that was coming down to wash into the brush. The brush didn't do any good itself, except that it was there and the creek was going to do the rest of the work.

Q. To keep the creek from going over towards the eastward?

A. Yes; keep the creek from going over to the plant.

Cross-examination.

(By Mr. COBB.)

Q. Just a minute. That whole flat out there is what is commonly called a delta, isn't it?

A. I think so.

Q. That is, from the electric light company's plant clear across the flats, it's low, flat ground?

A. Yes.

Q. Been made there by the water and stuff brought down by the water. Now, you say the creek channel, the main channel, was constantly shifting from one side to the other?

A. That is, when there would be flood waters, or something or another.

Q. It would shift; the channel would shift from

(Testimony of Gustave Anderson.)

one side to the other. That was the character of the ground? A. Yes. [331]

Q. During the time that you worked there, had you observed a great deal of high water at times?

A. No; I can't say that I have.

Q. Oh, you were working only at low water?

A. I worked only when the water was low; yes.

Q. When the high water came, you never observed it?

A. No; I never observed it particularly.

Q. You only worked at the season of the year when there was no high water? A. That's it.

Q. But you could tell that there was a shifting of the channels made by high water?

A. I suppose it was. Couldn't be nothing else.

Mr. COBB.—That's all.

Mr. FAULKNER.—That's all. [332]

Testimony of Mark Sabin, for Plaintiffs (In Rebuttal).

Then plaintiffs, in rebuttal, introduced the testimony of MARK SABIN, as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. Mark H. Sabin.

Q. Where do you reside, Mr. Sabin?

A. Juneau—12th Street.

Q. Do you know where the flume that was built some years ago by the owners of the Casey-Shattuck addition to carry the waters of Gold Creek passes under Willoughby Way? A. Yes, sir.

(Testimony of Mark Sabin.)

Q. Did you put any poles in that flume under the Way?

A. I put some posts under the bridge in there.

Q. When was that done?

A. Oh, it was last fall—some time late last fall—I don't remember.

Q. Was it after the flood? A. Yes, sir.

Q. There was none there before that?

A. I don't know, I didn't notice any.

Q. The piles that are there now are what you put in,—you didn't notice any at that time? A. No.

Q. You put in some since for the purpose of supporting the bridge?

A. We put in some poles in there—jacked it up and put some posts under it—that was after the flood.

Q. There was a bridge entirely across it?

A. How is that?

Q. There was a bridge entirely across it?

A. Oh, yes. (217—204)

Q. No supports under it at that time, in the flume itself? A. Well, not to my knowledge.

Q. I say at the time you went there you didn't find any? A. No, there wasn't any.

Q. There was no piling there that was stopping and holding [333] the debris?

A. No, there was none supporting the bridge, because I jacked it up and set some posts under it.

Q. I will ask you if those posts were put in the ground or simply set on it?

A. Set on top of the ground.

(Testimony of Mark Sabin.)

Mr. COBB.—That is all.

Cross-examination.

(By Mr. FAULKNER.)

Q. You don't know, Mr. Sabin, what was there before the flood?

A. No, I never had anything to do about building that bridge.

Mr. FAULKNER.—That is all.

(Witness excused.) [334]

Requested Instructions to the Jury.

And thereupon, and before the jury retired from the bar, the plaintiffs in writing prayed the Court to instruct the jury as follows:

“Gentlemen of the Jury: When the defendants undertook to build the bulkhead and flume mentioned in the pleadings and evidence whereby they changed the course, and confined the waters of Gold Creek into a new channel, it was their duty to see that the new channel which they provided as a substitute for the natural channel, is in all respects adequate to carry off the water brought down by an extraordinary rainfall. The evidence shows conclusively that the defendants failed to discharge this duty. The evidence further conclusively shows that the flood of September 26th, 1918, which destroyed plaintiffs' property was one which might reasonably have been anticipated; that the plaintiffs' property was situated on high ground far above the reach of flood waters from Gold Creek, and that because of the construction of said flume and bulkheads in the manner and of the capacity

they were, the flood waters were directed against the plaintiffs' property and caused the damages complained of. You are therefore instructed to return a verdict for the plaintiffs for the amount of the damages you find they have sustained under the instructions hereinafter given. In fixing the amount of your verdict you will ascertain the fair market value of the house and lot before the damage occurred, and the fair market value after such damages occurred and the difference would be the damages to the house and lot. In fixing the market value of the house and lot you will take into consideration the evidence as to the cost thereof, its condition of repair, and all other circumstances in evidence bearing upon that question. In addition to such sum as you may find for the damages to the house and lot you will add the fair market value [335] of the contents thereof which you find were destroyed, plus the damages, if any, to such part of the contents as you find were saved. The aggregate of these items should be the amount of your verdict."

But the Court refused said prayer, to which ruling, the plaintiffs then and there excepted.

Plaintiffs further prayed the Court in writing, to instruct the jury as follows:

"There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs' property was caused by an 'act of God' as that term is used in the law."

But the Court denied said prayer, to which ruling the plaintiffs excepted.

Plaintiffs further prayed the Court in writing, to instruct the jury as follows:

“If the building of the bulkheads and flume by the defendants caused the damage to the plaintiffs’ property, then they are liable and you should find a verdict for the plaintiffs. Now of course, the flume and bulkheads standing alone of themselves could not cause any damage to the plaintiffs’ property; but the flume and bulkheads were built for the purpose of, and did change the course and confine the flow of the waters of Gold Creek, and if the bulkheads and flume so controlled and influenced the flow of the flood waters and to deflect the current against plaintiffs’ lot and wash the soil and house away, then it was the bulkheads and flume which caused the damages. The question simply is this: Was the building of the flume and bulkheads by the defendants, in the manner and form disclosed by the evidence, a contributing factor without which the damages could not have occurred? If it was, the defendants are liable. [336]

“In deciding this question, you should bear in mind that it is admitted in the pleadings, and shown in the evidence, that prior to the building of the flume and bulkheads, when the stream was in its natural condition, plaintiffs’ house and lot was far above the reach of all ordinary floods; that Gold Creek was subject to sudden rises and periods of flood and high water, and that the flood of September 26th, 1918, though higher than usual, was still only such high water as was to be anticipated and guarded against by defendants when they undertook

to interfere with the natural channel and course of the stream.”

But the Court denied said prayer, to which ruling the plaintiffs excepted.

Plaintiffs further prayed the Court in writing, to instruct the jury as follows:

“If you find and believe from the evidence, that prior to the time the defendants built the cribbed channel and changed the course, and confined the waters of Gold Creek therein, the waters of said creek then unconfined except by their natural banks, flowed past plaintiffs’ lot, and in periods of high water spread out over the delta of the creek, finding and following the lowest natural channels to the sea, and this natural outlet through the channels and across the delta would have been sufficient to provide such an escape for the flood waters of September 26th, 1918, that said flood waters would not have undermined and washed out plaintiffs’ property; but that because of the building of the cribbed or bulkheaded channel, the flood waters on September 26th, 1918, were prevented from escaping and flowing off, as freely as they otherwise would, either because of the blocking up of the cribbed channel, or because of its insufficient capacity, or both, and the flood waters were diverted from their natural [337] channel, and the current driven ‘against the plaintiffs’ property, thereby undermining it, and washing it away, you will find for the plaintiffs for the damages they thereby suffered regardless of whether the flood of September 26, 1918, was the highest ever known in the creek or not.

To make the law on this point plain, you may ask yourselves this question: In the light of the evidence, if the bulkheaded and cribbed channel had never been built, and the stream left in its natural condition, would the high water of September 26th, 1918, have damaged plaintiffs' property? If you find from a preponderance of the evidence that it would not, then I instruct you to find for the plaintiffs."

But the Court denied said prayer, and the plaintiffs excepted.

The plaintiffs thereupon further prayed the Court in writing to instruct the jury as follows:

It is the duty of one who undertakes to change the course of a natural stream or to confine its waters in an artificial channel, to make such artificial channel of at least the size or capacity of the natural channel it is to replace, so as to safely carry off such flood waters as are likely to occur in the stream; and where the stream flows over or across a delta, and there are several channels across such delta, through which flood waters escape in time of floods, the artificial channel should be constructed of at least sufficient size to carry as much water as all of the natural channels it was to replace; if he who builds the artificial channel fails to do this, he is guilty of negligence and is liable for all damage caused by such negligence.

But the Court denied said prayer and the plaintiffs excepted.

The plaintiffs further prayed the Court in writing [338] to instruct the jury as follows:

“If you find and believe from the evidence that on September 26th, 1918, timbers or logs washed out of the bulkheaded or cribbed channel built by defendants at a point approximately opposite the upper end of plaintiffs’ lot, and such timbers or logs lodged in the channel of the creek causing a dam, or obstruction to the current; and that dam or obstruction threw the current over against the easterly bank, and cut and washed away the bank until it had eaten into and destroyed plaintiffs’ property, then I instruct you to find for the plaintiffs.”

But the Court refused to so instruct, to which ruling of the Court the plaintiffs duly excepted.

And thereupon the Court instructed the jury as follows:

Instructions of Court to the Jury.

“Gentlemen of the Jury: This is a civil action brought by A. Eikland and O. Eikland, as plaintiffs, versus W. W. Casey, Henry Shattuck and Allen Shattuck, defendants, for compensation in the nature of damages for the destruction of certain property of plaintiffs, alleged to have been caused by the overflow of Gold Creek, which overflow they attribute to the negligence of the defendants in constructing certain dams, abutments and flumes and altering the natural flow of the waters of said creek.

“The plaintiffs allege that in the year 1913 the defendants were the owners of a certain tract of land, embracing the flats bordering on a part of Gastineau Channel at the mouth of Gold Creek and

extending on both sides of said Creek, which said tract was subdivided into lots and blocks as the 'Casey-Shattuck Addition' to the town of Juneau, and that in that year they sold to the plaintiffs Lot 6 in Block 209 of said Addition, and the plaintiffs erected on said lot that [339] year a substantial dwelling-house at a cost and the reasonable value of \$3,000. It is further alleged that Gold Creek flows from a mountain range east of Juneau through a canyon out of which it flows near the boundary of the Casey-Shattuck Addition and across such addition into Gastineau Channel; that the watershed of the stream is very precipitous, and in times of heavy rains, to which the country is subject, there are periods of flood or high waters in the stream. Plaintiffs further allege that their house and lot was situated on the south side of the stream and a short distance therefrom, and a short distance below the point where the stream emerges from the mountain to a point some distance below plaintiffs' lot, the stream was confined by banks sufficiently high to contain the stream at all stages of water, even the highest floods, but that a short distance below plaintiffs' lot the stream, at times of high water, overflowed the banks and spread over a part of the Casey-Shattuck Addition and thereby allowed a free outlet to the waters to Gastineau Channel, and that in its natural condition plaintiffs' lot was far above any danger from flood waters of said stream at any and all stages. Plaintiffs further allege that after the sale of the lot by the defendants to them and after they had built their house and im-

proved the property the defendants, for their own purposes, viz., reclaiming a part of the said Casey-Shattuck Addition and making the same marketable which before had been subject to floods and overflows, built a dam or bulkhead across the stream at a point about opposite plaintiffs' lot, and from said dam and a point opposite and across the stream therefrom constructed bulkheads of logs and loose stones to Gastineau Channel at a point to the southwest, and thereby changed the course of the stream and deflected it sharply to the southeast in a curve around the west and south sides of plaintiffs' lot; and they further [340] allege that the new channel thus constructed, while sufficient to carry the waters of the stream at ordinary stages, was too shallow and too narrow and wholly insufficient to carry the waters at times of floods such as ordinarily occur therein at times of heavy rains; so, the stream as dammed and changed in its course, became a danger and menace to plaintiffs' property, and the defendants were fully warned and apprised of this before the said structures were built and that the said structures and changes in the channel of Gold Creek would inevitably cause damage to the plaintiffs' property, which would otherwise be entirely safe, at the first high water occurring after their completion. It is further alleged by the plaintiffs that the defendants were grossly negligent in the planning and construction of the flume to carry off the waters of the creek in this: They allege that the flume was planned and laid out with a depth of only five feet and a width of thirty feet

or thereabouts from its head to a point near its mouth, thereby being given a capacity of not more than one-half the capacity of the original creek channel it was to replace, which creek channel, it is claimed defendants well knew or could have known, was frequently taxed to its full capacity by flood waters coming down the creek. And they further allege that at a point near its mouth and thence to the point of discharge the flume was narrowed to a width of only 25 feet, thereby still further decreasing its capacity, and furthermore, rendering it extremely likely, if not inevitable, that in times of high water the usual debris coming down said creek at such times would become choked at said narrow point and thereby entirely prevent the flow of waters through the flume. And the plaintiffs further allege that the construction of the flume was too flimsy, weak and insufficient to hold together during flood waters of the creek, but on the contrary was such as to [341] permit the waters of the creek to undermine the walls of logs and wash them out into the flume and release the waters upon and against the adjacent ground. Plaintiffs further allege that on or about September 26th, 1918, there occurred one of the usual, periodical, heavy rains to which the vicinity is subject, and which caused the waters of Gold Creek to rise and pour out of the canyon into the Casey-Shattuck lands, and that the waters, unable to flow across the flat in their usual way, because of the dam, were forced through and down the flume or artificial channel; that said waters were laden with debris and because of the

narrowing of the flume or artificial channel at or near its mouth, the channel became choked so as to prevent the greater part of the flood waters from escaping through it, and by reason of the obstruction caused by the choking and the insufficient and weak walls of the flume or artificial channel, a part of the walls and the material out of which the walls were constructed gave way and were washed out into the flume and this caused the waters and the full force of the current to be deflected and to carry away a part of the westerly wall of the flume or artificial channel adjacent to the plaintiffs' property, and thereby caused the current to impinge upon, undermine and wash away the plaintiffs' house, together with its contents, and washed away the earth and soil on the lot itself, so that the deep channel of Gold Creek occupied the space formerly occupied by the lot and house, and that the lot and house with its contents, were an entire loss to the plaintiffs, which they say was due to the construction of said dam and bulkheads in a negligent, defective and insufficient manner, and they ask judgment for the value of the house and contents, and of the lot, which they allege to be \$5,000.

The defendants in their answer, deny each and every allegation of the complaint, except they admit they were the [342] owners of the tract of land embraced in the Casey-Shattuck Addition in 1913, at the mouth of Gold Creek, and that they subdivided it into lots and block and placed it on the market as the Casey-Shattuck Addition to the Town of Juneau. They further admit that they sold lot

6 in block 209 to the plaintiff, A. Eikland, and they admit that the plaintiff erected a house on said property which they say was not worth more than \$1,500. They further admit that Gold Creek flows from the mountain range east of Juneau across the Casey-Shattuck Addition, and that there are periods of floods in this region and that the lot aforesaid was situated on the southeast side of the stream, far above any danger from floods from said stream during the periods of ordinary high water. They further admit that they built a bulkhead, but allege that the said bulkhead was so constructed that the said channel could carry the waters of said stream at all times, including freshets and periods of high water. They admit that on September 26th, 1918, a flood occurred, due to the heavy and unusual rains which caused the waters of Gold Creek to rise and that the said flood damaged the property of the plaintiffs, but allege that the said flood and the said rains were unusual, unprecedented and extraordinary and such as have never before occurred in the vicinity, and such as could not have been foreseen by the defendants or anyone else, and allege that the damage was due solely to an act of God; and they deny that the damage to said lot was in excess of \$1,500.

The plaintiffs in their reply, deny that the damage was done by an act of God.

The above and foregoing are the issues made by the pleadings, and you are instructed in this connection, that those matters alleged by the plaintiffs and admitted by the defendants in the pleadings

are to be taken by you as true in your consideration of the case. That is to say, they are matters over which there is no controversy. You will, therefore, in considering the case, accept the following facts as true, namely: That in 1913 defendants sold to the plaintiff the lot mentioned in the pleadings; that the plaintiffs built a house thereon; and that subsequently the defendants, for purposes of their own, erected along the banks of Gold Creek, on either side thereof, bulkheads for the purpose of confining the stream; that on or about September 26th, 1918, the lot with the house thereon and its contents, was damaged by the flood or washed into Gold Creek.

The foundation for this action is the alleged negligence of the defendants in the construction of a so-called flume and series of bulkheads, confining or diverting the waters of Gold Creek from their natural course, by reason of which the waters of said creek were thrown on the property of the plaintiffs, and the property damaged or destroyed."

The Court further instructed the jury as follows:

"Naturally two questions arise under the issues and admitted facts as I have detailed to you: The first is,—was the flume of such faulty construction, either in its flimsy character, as alleged by the plaintiffs, or in the manner of its construction, as alleged by the plaintiffs, that it caused or contributed to the destruction of the property of the plaintiffs. The second question is,—whether the damage complained of was caused solely by an

act of God and in no way contributed to by the act of the defendants in the construction of the flume. These two questions are somewhat interwoven, for if the bulkheads or structures of the defendants contributed to or caused the damage, then such structures would be the proximate cause of the damage. If, however, an act of God was the cause of the damage and not aided by the act of the defendants in the construction of the flume or bulkheads as alleged by the [344] plaintiffs, the defendants would not be liable. If the construction of the bulkheads by the defendants caused or contributed to the destruction of the property of the plaintiffs, then the defendants are liable. If it was due solely to the extraordinary rainfall, unaffected and uninfluenced in any way by the structures put along said stream by the defendants, then the defendants are not liable.

Now, Gentlemen, all acts of negligence are not actionable. While it is a canon of the law that a man should so use his own as not to injure another, yet to render an injury actionable for negligence, the injury resulting from the act must be because of a lack of ordinary care. An injury that is the natural consequence of an act of negligence is actionable; but an injury which could not have been foreseen, nor reasonably anticipated as the probable result of an act, in the light of attending circumstances, is not actionable. To constitute proximate cause, creating liability for negligence, the injury must have been the natural and probable result of the act, and the result should be one

which, in the light of attending circumstances, an ordinarily prudent man might reasonably have foreseen. An injury that is a natural and probable consequence of an act of negligence is actionable and such an act is the proximate cause of the injury; but an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence, is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence but which could not have been foreseen or reasonably anticipated as to its probable consequences and which would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. [345]

A natural consequence of an act is a consequence which ordinarily follows from it, the result of which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. Therefore, in the cause before you, if you find from the evidence that the construction of the bulkhead or flume, as constructed, contributed to or caused the damage complained of by the plaintiffs, and such resulting injury could not have been reasonably anticipated or foreseen, in view of all the attending circumstances, then you should find for the defendants. But, if you should find from the evidence that the damage could have been reasonably anticipated or foreseen from the con-

struction of the bulkhead or flume, then the defendants are liable, and your verdict should be for the plaintiffs.”

To which instructions the plaintiffs then and there excepted. And the Court further instructed the jury as follows:

“In viewing the circumstances attendant on the construction of the flume, and determining whether it was the proximate cause of the damage, you should take into consideration the facts shown by the testimony in reference to the climatic conditions of the country, the flow of Gold Creek, its liability to floods from heavy rains and melting snows or otherwise, its situation with reference to the surrounding country, the condition and size of its channel or channels, the situation of the property damaged with reference to the stream, the natural flow of the waters, the manner of constructing the flume or bulkheads and size thereof, in view of these conditions and all other facts and circumstances known, or which should have been known, considering the conditions at the time, to an ordinarily prudent man, contemplating such construction,—and from them decide whether the defendants used ordinary care in such [346] construction.

The channel in which a stream flows is a component part of a stream itself and one owner cannot change the flow to another channel to the injury of a lower or another property along the stream without being liable for the damage. One who undertakes to change the channel of a stream

must see that the capacity of the new channel is, in all respects, equal to that of the old channel or channels, and he will be liable for injury caused by the overflow of the stream in case this is not so; and, although the size of the new channel may be even greater than that of the old channel or channels, this will not relieve one from liability for changing it if it is constructed in such a manner as to be more liable to overflow. So, if you find and believe that the change made in the channel of Gold Creek by the defendants rendered it more likely for the waters thereof to overflow and damage the plaintiff's property than when the channel was in its natural condition, and that this change did in fact cause the waters to overflow and damage the plaintiffs' property,—then the defendants are liable and your verdict should be for whatever damages you may find they have sustained. It is admitted that defendants, for their own purposes, erected certain structures along the bank of Gold Creek for the purpose of confining this channel and the waters therein. In doing this, they were bound to provide a channel of as great a capacity to obtain and carry off the flow of waters as the natural channel or channels which they replaced; and they were also bound to exercise due care in the planning and construction of the artificial channel so as not to lessen its capacity. So, if you find and believe, that in the planning and construction of the artificial channel by the defendants, they narrowed such channel at or near its mouth, and that this made it liable to become choked during times

of flood water and that it did in fact, become choked because of such flood on the [347] day that this property was destroyed; and that the defendants knew, or by the exercise of ordinary care, should have known the effect of such narrowing, and this manner of planning and construction was a direct cause of the choking up of said channel and the cause of the breaking and overflowing of the bulkheads which caused the damage and destruction of the plaintiffs' property, then the defendants are liable and your verdict should be for the plaintiffs.

If the defendants knew, or by the exercise of ordinary care, should have known that there were times of flood in Gold Creek when the capacity of the channels of the creek in its natural condition was taxed to its full capacity to carry the flood waters, then it was the defendants' duty, when they undertook to put in a bulkhead and build the artificial channel which they put in and built, to give to such new channel a capacity at least equal to that of the natural channels which it was to replace, and if they failed in this respect, and that failure was the direct and proximate cause of the destruction of the plaintiffs' property, then it will be your duty to find for the plaintiffs.

If the bulkheads and flume or artificial channel put in by the defendants diverted and confined the waters of Gold Creek, and by reason of diversion and confinement as alleged by the plaintiff, was the proximate cause of the destruction of the plaintiffs' property, then the defendants are liable. By proxi-

mate cause is meant the efficient, actual cause. Of course the bulkheads of themselves would not cause the damage; but if the bulkheads and flume or artificial channel so controlled and affected the flood waters on September 26, 1918, as to cause said waters to destroy plaintiffs' property, then they were in law the proximate cause of the destruction, notwithstanding the fact that such destruction was immediately produced by the flood and high water." [348]

And the Court further instructed the jury as follows:

"A person obstructing or diverting a natural watercourse from its channel by the erection of bulkheads, dams or other structures, is not required to build in anticipation of, or in preparation for, floods or freshets which are not only extraordinary, but unprecedented and cannot really be foreseen, such floods being, in contemplation of law, an act of God. An act of God is an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of care which a reasonable man would exercise under like conditions and without any fault attributable to the parties sought to be held responsible. An extraordinary or unprecedented flood may be an act of God, but not an ordinary flood, or one that, in view of the conditions at the time, may occasionally occur, even though it occur at irregular intervals. It is clear that a rainfall causing a flood may be more than ordinary; yet, if it be such as has occasionally occurred, although it may be at irregu-

lar intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream in which it occurs, reasonably have been anticipated. An extraordinary flood, to constitute what would be an act of God, relieving a person from all liability, is one of those unexplained visitations whose comings are not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight.” [349]

To which instructions the plaintiffs then and there excepted. And the Court further instructed the jury as follows:

“It is the duty of a person diverting or obstructing the natural channel of a stream to provide, not only for the normal flow thereof, but for such floods or freshets as may occasionally occur. Hence, if you find from the evidence that the flood of September 26, 1918, referred to in the pleadings and evidence in this case was such as in the memory or experience of residents in the vicinity thereof had occasionally occurred before, or could be expected to occur again, even though at irregular and long intervals of time, then such a flood would not be considered such ‘an act of God’ or unprecedented flood as would relieve the person obstructing or di-

verting the normal flow of the waters of the stream from liability for damages caused by such obstruction or diversion.

The defendants, in the case at bar, claim that the damages to the plaintiffs' house and lot was occasioned by such an extraordinary flood; that is, that a flood whose coming was not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight.

It is for you, Gentlemen of the Jury, to decide whether the flood of September 26, 1918, was of such character, or whether it might, by the exercise of ordinary diligence in investigating the character and habits of the stream, reasonably have been anticipated.

I charge you further that where rains are so unprecedented and the flood caused thereby so extraordinary that it is, in legal contemplation, the act of God, and the one obstructing the natural course can not be held liable,—it must appear, in order to give immunity under that rule, that the act of God was not only the proximate cause of the damage, but the [350] sole cause of the damage. It must appear, before the defence of an act of God can be available, that there was an entire exclusion of human agency from the cause that produced the injury, and an occurrence which is produced partially by the intervention of human agencies is not an act of God within the meaning of the law. Therefore, although you find that the flood of September

26, 1918, was an extraordinary flood, amounting to an act of God which could not have been foreseen or anticipated, as I have heretofore defined to you, yet, if you find that the negligent construction by the defendants of the bulkhead or flume contributed to the injury complained of by the plaintiffs, then the act of God was a remote cause, and the construction of the flume or bulkhead was the proximate cause of the damage and your verdict should be for the plaintiffs. In other words, where an injury is the combined result of the negligence of the defendant and of an accident for which the defendant is not responsible, the defendant must pay the damages, unless the damage would have happened if he had not been negligent.

A person owning land through which a stream flows has a right to build a bulkhead on the banks of the stream to confine its course for the purpose of protecting his own property or that of others and for any other lawful purpose, provided he does so with due care and such as a reasonably prudent man would use; and if he exercises that degree of care which a reasonably prudent man would exercise, having in view all the circumstances, such as climatic conditions, the topography of the country and periods of ordinary high water in the stream, he will not be liable for damages to another caused solely by an extraordinary or unprecedented flood.

If the flood of September 26, 1918, was such that the damage would have been caused to plaintiff's property if the bulkheads had not been constructed by the defendants, the question of whether the flood

was extraordinary or unprecedented would be immaterial, and your verdict must be for the defendants. [351] In other words, if you find that if the defendants had not constructed the bulkheads at all, and that the flood was of such character that the damage would have been done by the waters of Gold Creek and the debris and timbers, etc., that it carried down, you need not determine whether the flood was ordinary or extraordinary, and you must find for the defendants. If it becomes necessary for you to determine whether the flood was ordinary or extraordinary, you are to take into consideration all the evidence on this point; and you may consider the weather records; the stream flow measurements, as far as they go, and all the testimony of the witnesses who have testified from their memories of flood conditions.

The plaintiffs seek, in this case, to recover damages from the defendants because they allege that the defendants were negligent in the construction of a bulkhead on the banks of Gold Creek. You are instructed the burden is on the plaintiffs to prove to your satisfaction, by a preponderance of the evidence, that the defendants were in fact negligent in the respect alleged. The plaintiffs must establish, by a preponderance of the evidence, all material allegations of the complaint, and if they have not done so, your verdict must be for the defendants. You are instructed that the defendants had a right to construct the bulkhead in question for lawful purposes, provided that they used due care, such as an ordinarily prudent man would use, in view of all

the circumstances attending the case. In the construction of the bulkhead, the defendants were not bound to make it absolutely safe at all hazards; they were not bound to use the highest possible degree of care, nor to guarantee to every one that the bulkheads were safe, but they were required to use the degree of care that a reasonably prudent and careful man would use, having in mind all the facts and circumstances and the climatic conditions, and all knowledge obtainable from experience with flood conditions of the stream. [352]

You are the sole judge of the credibility of the witnesses and of the weight of the evidence and other facts. It is your right to determine, from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor or frankness, or lack thereof, which witnesses are more worthy of credit and to give weight accordingly. In determining the weight to be given the testimony of witnesses, you are authorized to consider their relationship, if any, to the parties, their interest, if any, in the outcome of the suit, their temper, feeling or bias, if any has been shown, their demeanor on the stand, their means of obtaining information and the reasonableness of the stories told by them, and to give weight accordingly. The power to judge of the effect and value of evidence is not an arbitrary power, but one to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your mind against a less

number or against presumption or other evidence satisfying your minds. A witness wilfully false in one part of his testimony may be distrusted in others.

In this case, as in all civil cases, the affirmative of the issue must be proved, and when the evidence is contradictory, the findings should be according to the preponderance of the evidence; and evidence should be estimated, not only by its intrinsic weight, but according to the evidence which it is in the power of one side to produce and of the other to contradict. Therefore, if weaker and less satisfactory evidence is offered, when it appears stronger and more satisfactory evidence was within the power of the party to produce, that evidence should be viewed with distrust.

You should decide this case upon all the evidence and the instructions of the court, not taking into consideration any extraneous matters. You are to decide it without fear, [353] favor or sympathy for either party; nor should bias or friendship to either party to the action in any way influence you.

If you find for the plaintiffs, under the instructions and from the evidence, you will assess the plaintiffs' damages at the sum as you will find they have been actually injured by the destruction of their property, and in arriving at that sum, you will allow them the reasonable market value for the lot, house and its contents. By 'reasonable market value' is meant what the plaintiffs could have realized by a sale of their property at or near the time of its destruction,—not what it would bring at a

forced sale and not what it would bring from some one especially desirous of owning it, but what would have been realized from it if it had been placed on the market and sold at or near the time of its destruction. In arriving at a fair market value, you must take into consideration the evidence as to the cost of the property; its condition at the time of its destruction, and all other facts and circumstances, as far as they are shown by the evidence, which would have a bearing on the question of what was the fair and reasonable market value on the day the property was destroyed.

I hand you two forms of verdict,—one for the plaintiff, and one for the defendant.

When you have retired to your jury-room, you will elect one of your number foreman, and after you have arrived at a verdict, fill out one of these forms and return the same into open court."

And the above and foregoing were all the instructions given by the Court.

And because the above and foregoing matters do not appear of record, I, Thomas M. Reed, the Judge before whom said cause was tried, do hereby certify that the above and foregoing is a full, true, and correct bill of exceptions, and contains [354] all the evidence produced on the trial except that relating solely to the value of the property destroyed, which is admitted as immaterial in the Appellate Court, and excepting the exhibits, the originals of which are ordered transmitted with the transcript of the record; and I further order the said Bill of Exceptions to be filed and made a part of the record herein.

Done this the 2d day of January, 1923, during the term at which said cause was tried.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Jan. 2. John H. Dunn, Clerk. By W. B. King, Deputy. [355]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

Assignments of Error.

Now come the plaintiff in the above-entitled and numbered cause, and assign the following errors committed by the Court on the trial, and in the rendition of the judgment in said cause, to wit:

I.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

“Gentlemen of the Jury: When the defendants undertook to build the bulkhead and flume mentioned in the pleadings and evidence whereby they changed the course, and confined the waters of Gold Creek into a new channel, it

was their duty to see that the new channel which they provided as a substitute for the natural channel, is in all respects adequate to carry off the water brought down by an extraordinary rainfall. The evidence shows conclusively that the defendants failed to discharge this duty. The evidence further conclusively shows that the flood of September 26th, 1918, which destroyed plaintiffs' property was one which might reasonably have been anticipated; that plaintiffs' property was situated on high ground far above the reach of flood waters from Gold Creek; and that because of the construction of said flume and bulkheads in the manner and of the capacity they were, the flood waters were directed against the plaintiffs' property and caused the damages [356] complained of. You are therefore instructed to return a verdict for the plaintiffs for the amount of the damages you find they have sustained under the instructions hereinafter given.

In fixing the amount of your verdict you will ascertain the fair market value of the house and lot before the damage occurred, and the fair market value after such damages occurred and the difference would be the damages to the house and lot. In fixing the market value of the house and lot you should take into consideration the evidence as to the cost thereof, its condition of repair, and all other circumstances in evidence bearing upon that question. In addition to such sum as you may find for the

damages to the house and lot, you will add the fair market value of the contents thereof which you find were destroyed, plus the damages, if any, to such part of the contents as you find were saved. The aggregate of these items should be the amount of your verdict."

II.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs' property was caused by an 'act of God' as that term is used in the law."

III.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If the building of the bulkhead and flume by the defendants caused the damage to the plaintiffs' property, then they are liable and you should find a verdict for the plaintiffs. Now of course, the flume and bulkheads standing alone of themselves could not cause any damages to the plaintiffs' property; but the flume and the bulkheads were built for the purpose of, and did change the course and confine the flow of the waters of Gold Creek, and if the [357] bulkheads and flume so controlled and influenced the flow of the flood waters and to deflect the current against plaintiffs' lot and wash the soil and house away, then it was the bulkheads and flume which caused the damages. The question simply is this: Was the building

of the flume and bulkheads by the defendants, in the manner and form disclosed by the evidence, a contributing factor without which the damage would not have occurred? If it was, the defendants are liable. In deciding this question, you should bear in mind that it is admitted in the pleadings, and shown in the evidence, that prior to the building of the flume and bulkheads, when the stream was in its natural condition, plaintiffs' house and lot was far above the reach of all ordinary floods; that Gold Creek was subject to sudden rises and periods of floods and high water, and that the flood of September 26th, 1918, though higher than usual, was still only such high water as was to be anticipated and guarded against by defendants when they undertook to interfere with the natural channel and course of the stream."

IV.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If you find and believe from the evidence, that prior to the time the defendants built the cribbed channel and changed the course and confined the waters of Gold Creek therein, the waters of said creek then unconfined except by their natural banks, flowed past plaintiffs' lot, and in periods of high water spread out over the delta of the creek, finding and following the lowest natural channels to the sea, and this natural outlet through the channels and across the delta would have been sufficient to provide

such an escape for the flood waters of September 26th, 1918, that said flood waters would not have undermined and washed out plaintiffs' property, but that because of the building of the cribbed or [358] bulkhead channel, the flood waters on September 26th, 1918, were prevented from escaping and flowing off, as freely as they otherwise would, either because of the blocking up of the cribbed channel, or because of its insufficient capacity, or both, and the flood waters were diverted from their natural channel and the current driven against the plaintiffs' property, thereby undermining it, and washing it away, you will find for the plaintiffs for the damages they thereby suffered regardless of whether the flood of September 26th, 1918, was the highest ever known in the creek or not. To make the law on this point plain, you may ask yourselves this question: In the light of the evidence, if the bulkheaded and cribbed channel had never been built, and the stream left in its natural condition, would the high water of September 26th, 1918, have damaged plaintiffs' property? If you find from a preponderance of the evidence that it would not, then I instruct you to find for the plaintiffs."

V.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"It is the duty of one who undertakes to change the course of a natural stream or to confine its waters in an artificial channel, to make

such artificial channel of at least the size or capacity of the natural channel it is to replace, so as to fully carry off such flood waters as are likely to occur in the stream; and where the stream flows over or across a delta, and there are several channels across such delta, through which flood waters escape in time of floods, the artificial channel should be constructed of at least sufficient size to carry as much water as all the natural channels it was to replace; if he would builds the artificial channel fails to do this, he is guilty of negligence and is liable for all damages caused by such negligence." [359]

VI.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If you find and believe from the evidence that on September 26th, 1918, timbers and logs washed out of the bulkheaded or cribbed channel *build* by defendants at a point approximately the upper end of plaintiffs' lot, and such timbers or logs lodged in the channel of the creek causing a dam, or obstruction to the current; and that dam or obstruction threw the current over against the easterly bank, and cut and washed away the bank until it had eaten into and destroyed plaintiffs' property, then I instruct you to find for the plaintiffs."

VII.

The Court erred in instructing the jury as follows:

“Naturally two questions arise under the issues and admitted facts as I have detailed you: The first is,—was the flume of such faulty construction, either in its flimsy character, as alleged by the plaintiffs, or in the manner of its construction, as alleged by the plaintiffs, that it caused or contributed to the destruction of the property of the plaintiffs. The second question is,—whether the damage complained of was caused solely by an act of God and in no way contributed to by the act of the defendants in the construction of the flume. These two questions are somewhat interwoven; for if the bulkheads or structures of the defendants contributed to or caused the damage, then such structures would be the proximate cause of the damage. If, however, an act of God was the cause of the damage and not aided by the act of the defendants in the construction of the flume or bulkheads as alleged by the plaintiffs, the defendants would not be liable. If the construction of the bulkheads by the defendants caused or contributed to the destruction of the property of the plaintiffs, [360] then the defendants are liable. If it was due solely to the extraordinary rainfall, unaffected and uninfluenced in any way by the structures put along said stream by the defendants, then the defendants are not actionable.

Now, Gentlemen, all acts of negligence are not actionable, While it is a canon of the law that a man should so use his own as not to injure

another, yet to render an injury actionable for negligence, the injury resulting from the act must be because of a lack of ordinary care. An injury that is the natural consequence of an act of negligence is actionable; but an injury which could not have been foreseen, nor reasonably anticipated as the probable result of the act, in the light of attending circumstances, is not actionable. To constitute approximate cause, creating liability for negligence, the injury must have been the natural and probable result of the act, and the result should be one which, in the light of attending circumstances, an ordinarily prudent man might reasonably have foreseen. An injury that is a natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury; but an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence, is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence but which could not have been foreseen or reasonably anticipated as to its probable consequences and which would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. A natural consequence of an act is a consequence which ordinarily follows from it, the re-

sult of which may be reasonably anticipated from it. A probable consequence is [361] one that is more likely to follow its supposed cause than it is to fail to follow it. Therefore, in the cause before you, if you find from the evidence that the construction of the bulkhead or flume, as constructed, contributed to or caused the damage complained of by the plaintiffs, and such resulting injury could not have been reasonably anticipated or foreseen, in view of all the attending circumstances, then you will find for the defendants. But, if you should find from the evidence that the damage could have been reasonably anticipated or foreseen from the construction of the bulkhead or flume, then the defendants are liable. and your verdict should be for the plaintiffs.”

VIII.

The Court erred in instructing the jury as follows:

“A person obstructing or diverting a natural watercourse from its natural channel by the erection of bulkheads, dams or other structures, is not required to build in anticipation of, or in preparation for floods or freshets which are not only extraordinary, but unprecedented and cannot really be foreseen, such floods being, in contemplation of law, an act of God. An act of God is an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of care which a reasonable man would exercise under like condi-

tions, and without any fault attributable to the parties sought to be held responsible. An extraordinary or unprecedented flood may be an act of God, but not an ordinary flood, or one that, in view of the conditions at the time, may occasionally occur, even though it occur at irregular intervals. It is clear that a rainfall causing a flood may be more than ordinary, yet, if it be such as has occasionally occurred although it may be at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing [362] or restraining the flow of water to provide against the consequences that will result from it. An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream in which it occurs, reasonably have been anticipated.

An ordinary flood, to constitute what would be an act of God, relieving a person from all liability, is one of those unexplained visitations whose comings are not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight."

IX.

The Court erred in instructing the jury as follows:

"The defendants, in the case at bar, claim that the damage to the plaintiffs' house and lot

was occasioned by such an extraordinary flood; that is, that a flood whose coming was not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight. It is for you gentlemen of the jury to determine whether the flood of September 26, 1918, was of such character, or whether it might, by the exercise of ordinary diligence in investigating the character and habits of the stream, reasonably have been anticipated."

And for said errors and others manifest of record, plaintiffs pray that the judgment of the lower Court be reversed and the cause remanded for a new trial, and that on such new trial the Court below be commanded to instruct the jury to return a verdict for the plaintiffs for such damages as they may find, and for other and further directions as to [363] this Court may seem proper.

JAMES WICKERSHAM and

J. H. COBB,

Attorneys for Plaintiffs in Error,

Filed in the District Court, District of Alaska,
First Division. Jan. 3, 1923. John H. Dunn, Clerk.
By W. B. King, Deputy. [364]

In the District Court for the District of Alaska,
Division Number One, at Juneau

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States to the Judge of
the District Court of the United States for
Alaska, Division Number One, GREETING:

Because in the record and proceedings as also in
the rendition of a judgment of a plea which is before
you, wherein A. Eikland and O. Eikland are plain-
tiffs and W. W. Casey, Henry Shattuck and Allen
Shattuck are defendants, a manifest error hath
happened to the great damage of the said A. Eik-
land and O. Eikland as by that petition doth ap-
pear.

We being willing that error, if any hath hap-
pened, should be duly corrected, and speedy justice
done to the parties in that behalf, do command you,
if judgment be therein given, that then under your
seal, distinctly and openly, you send the record and
proceedings aforesaid, with all things pertaining
thereto, to the United States Circuit Court of Ap-
peals for the Ninth Circuit at the City of San Fran-
cisco, State of California, so that you have the same

before said Court on or before thirty days from the date of this writ, so that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws [365] and customs of the United States ought to be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the seal of the District Court of Alaska, Division Number One, affixed at Juneau, Alaska, this the 3d day of January, 1923.

[Seal]

JOHN H. DUNN,
Clerk.

Filed in the District Court, District of Alaska, First Division. Jan. 3, 1923. John H. Dunn, Clerk. By W. B. King, Deputy.

Allowed this the 3d day of January, 1923.

THOS. M. REED,
Judge.

Filed and served by lodging a true Copy with the Clerk of the District Court. [366]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, A. Eikland and O. Eikland, as principals, and George Marshall, and L. F. Morris, as sureties, hereby acknowledge ourselves to be indebted and bound to pay to W. W. Casey, Henry Shattuck and Allen Shattuck the sum of Two Hundred and Fifty Dollars, good and lawful money of the United States, for the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such, however, that whereas the above bound A. Eikland and O. Eikland have sued out a writ of error in the above-entitled cause from the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment rendered in said cause on the 18th day of November, 1922.

Now, if the said A. Eikland and O. Eikland shall prosecute their writ of error to effect and pay all such costs and damages as may be awarded against

them if they fail to make their plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

WITNESS our hands this the 3d day of January, 1923.

A. EIKLAND.

O. EIKLAND.

By J. H. COBB,

Their Attorney of Record. [367]

GEORGE MARSHALL,

L. F. MORRIS.

Approved as to form and sufficiency of sureties this the 3d day of January, 1923.

THOS. M. REED,

Judge.

O. K.—H. L. FAULKNER,

Atty. For Defendants.

Filed in the District Court, District of Alaska, First Division. Jan. 3, 1923. John H. Dunn, Clerk. By W. B. King, Deputy. [368]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States to W. W. Casey,
Henry Shattuck and Allen Shattuck and H. L.
Faulkner, Their Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error lodged in the clerk's office for the District for Alaska, Division Number One, in a cause wherein *A. Eikland and O. Eikland and* plaintiffs in error and you are defendants in error, then and there to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 3d day of January, 1923, and of the Independence of the United States the one hundred and forty-eighth.

THOS. M. REED,
Judge

Service of the above and foregoing citation on writ of error is admitted this the 3d day of January, 1923.

H. L. FAULKNER,
Attorney for Defendants in Error.

Filed in the District Court, District of Alaska,
First Division. Jan. 4, 1923. John H. Dunn,
Clerk. By W. B. King, Deputy. [369]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

Order Directing Transmission of Original Exhibits.

It being impossible to copy all the hereinafter
named-exhibits, and the same being deemed neces-
sary on the hearing of this case in the Appellate
Court:

IT IS ORDERED that the clerk of this court
transmit, with the transcript of the record herein,
to the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit, at San Francisco,
California, the following exhibits, to wit:

PLAINTIFF'S EXHIBITS.

- A. Tracing of Casey-Shattuck Addition.
- B. Cross-section of cribbed channel.
- C. Photo of Gastineau Channel and Juneau,
showing washed out area in red, taken be-
fore the flood.
- D. Photo showing Gold Creek in Casey-Shat-
tuck Addition after flood, showing break

in bulkhead through which waters escaped to eastward and washed *our* Eikland's and other houses, and showing stream in new channel.

E. List of contents of Eikland house.

F. Blue-print of Casey-Shattuck Addition.

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DEFENDANTS' EXHIBITS.

- No. 1. Large photo showing stream after flood, flowing in old and new channels, about the same as Plaintiffs' Exhibit "D."
- No. 2. Photo showing logs jammed in cribbed channel just north of Willoughby Ave. Bridge and back of houses along Willoughby.
- No. 3. Photo taken in winter from upper Gold Creek bridge, looking down Gold Creek, toward Northern Laundry, and showing northerly end of bulkhead on west side of stream, washed out area adjacent to laundry.
- No. 4. Photo taken after flood, or while flood was subsiding, showing jammed cribbed channel, with waters backed up in it. Photo taken east of channel and just north of Willoughby Ave. bridge and shows hospital with water running around, in front and beyond it.
- No. 5. Photo taken after flood from point apparently just to the west of where Eikland's house stood on Ninth Street, showing washed out area north thereof, with

the new channel in the immediate foreground, part of sidewalk on the north side of Ninth Street and picket fence apparently on Eikland's lot. Taken in winter.

No. 6. Certificate of Department of Agriculture to statement showing greatest precipitation during 24-hour periods from 1909 to 1918.

No. 7. Photo taken evidently from Willoughby Ave. [371] looking north, showing log jam, etc., in cribbed channel. Photo taken 11-9-22 by L. V. Winter.

No. 8. Photo taken on same date, looking southeast, showing log jam under Willoughby Ave. bridge.

Dated this the 3d day of January, 1923.

THOS. M. REED,
Judge.

O. K.—H. L. FAULKNER,
Atty. for Defendants.

Filed in the District Court, District of Alaska, First Division. Jan. 3, 1923. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. S, page 17. [372]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

Sir: You will please make up the transcript of the record in the above-entitled and numbered cause, and include therein the following papers, to wit:

1. Amended complaint, filed June 3d, 1921.
2. Answer to amended complaint, filed Oct. 15, 1921.
3. Reply, filed Oct. 20th, 1921.
4. Judgment, entered Nov. 18, 1921.
5. Bill of exceptions.
6. Assignment of errors.
7. Writ of error.
8. Bond on writ of error.
9. Citation.
10. Order directing transmission of exhibits to Appellate Court.
11. This praecipe.

Said transcript to be made up in accordance with the rules of the United States Circuit Court of Ap-

peals for the Ninth Circuit, and transmitted to the clerk of said Court at San Francisco, California.

J. H. COBB,

Attorney for Defendants and Plaintiffs in Error.

Filed in the District Court, District of Alaska,
First Division. Jan. 3, 1923. John H. Dunn,
Clerk. By W. B. King, Deputy. [373]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 373 pages of typewritten matter, numbered from one to 373, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record as per praecipe of the plaintiffs in error, on file herein and made a part hereof, in the cause wherein A. Eikland and O. Eikland are plaintiffs in error and W. W. Casey, Henry Shattuck and Allen Shattuck are defendants in error, No. 1787—A, as the same appears of record and on file in my office, and that the said record is by virtue of a writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to One Hundred Sixty-eight Dollars (\$168.00), has been paid to me by the attorney for plaintiffs in error.

IN WITNESS WHEREOF I have hereunto set my hand and seal of the above-entitled Court this 10th day of January, 1923.

[Seal]

JOHN H. DUNN,
Clerk.

By _____
Deputy.

[Endorsed]: No. 3974. United States Circuit Court of Appeals for the Ninth Circuit. A. Eikland and O. Eikland, Plaintiffs in Error, vs. W. W. Casey, Henry Shattuck and Allen Shattuck, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed January 22, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3974.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

A. EIKLAND et al.,

Plaintiffs in Error.

vs.

W. W. CASEY et al.,

Defendants in Error.

**Stipulation and Order Omitting Original Exhibits
from Printed Transcript of Record.**

It is hereby stipulated by and between the parties hereto that the Clerk of the Appellate Court need not print or have reproduced the original exhibits ordered sent up with the record but that such exhibits shall be used and considered by the Court upon the hearing the same as if printed.

This stipulation is made subject to the approval of the Court.

J. H. COBB,

Attorney for Plaintiffs in Error.

H. L. FAULKNER,

Attorney for Defendants in Error.

Dated: San Francisco, California, January 31,
1923.

So ordered:

WM. W. MORROW,

United States Circuit Judge.

[Endorsed]: Stipulation and Order Omitting Original Exhibits from Printed Transcript of Record. Filed February 1, 1923. F. D. Monekton, Clerk. By Paul P. O'Brien, Deputy Clerk.

